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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 133

**THE BALTIMORE & OHIO RAILROAD COMPANY
ET AL, APPELLANTS,**

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK**

FILED JUNE 29, 1937

SUPREME COURT OF THE UNITED STATES

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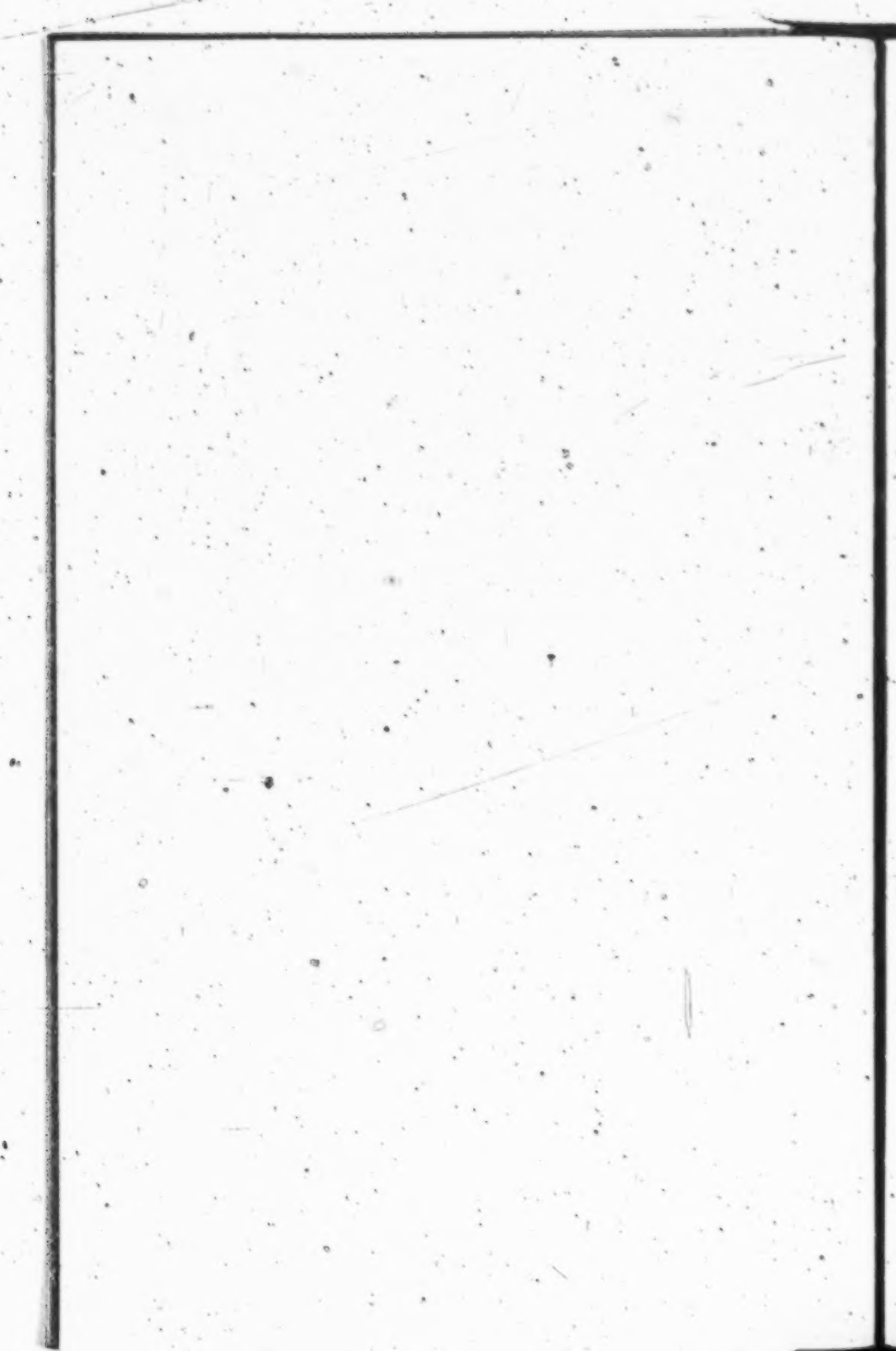
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**IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

In Equity. No. 84402

THE BALTIMORE AND OHIO RAILROAD COMPANY et al.,
Plaintiffs,

VS.

UNITED STATES OF AMERICA, Defendant

PETITION

To the Honorable Judges of the District Court of the United
States for the Southern District of New York:

The Baltimore and Ohio Railroad Company and other
plaintiffs, hereinafter more fully described, bring this, their
petition against the United States of America and hereby
sue to enjoin, set aside, suspend and annul a certain order,
as hereinafter set forth, of the Interstate Commerce Com-
mission (hereinafter called the Commission), and in sup-
port of said petition and prayer for injunctive relief, plain-
tiffs complain and say:

I

The plaintiffs herein are the following named railroads:

[fol. 6] The Baltimore and Ohio Railroad Company, a
corporation of the State of Maryland;

The Central Railroad Company of New Jersey, a corpo-
ration of the State of New Jersey;

The Delaware, Lackawanna and Western Railroad Com-
pany, a corporation of the State of Pennsylvania;

Erie Railroad Company, a corporation of the State of
New York;

Lehigh Valley Railroad Company, a corporation of the
State of Pennsylvania;

The New York Central Railroad Company, a corpora-
tion of the States of New York, Ohio, Illinois, Indiana,
Pennsylvania and Michigan;

The Pennsylvania Railroad Company, a corporation of
the State of Pennsylvania.

II

All the plaintiffs are common carriers engaged in the transportation of property by railroad in interstate commerce, to, from and within what is commonly known as the Port of New York District and are subject to the Interstate Commerce Act (49 U. S. C. A. Ch. 1, Part I.). Said plaintiffs severally own, hold, control or operate numerous warehouses, buildings and piers in said Port of New York District. Plaintiffs by leases or other arrangements provide space in said warehouses, buildings and piers for numerous persons, some of whom ship property in interstate commerce over plaintiffs' railroads and others of whom do not so ship.

[fol. 7]

III

This suit is brought under Acts of Congress approved on June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1149) and October 22, 1913 (38 Stat. 219); Code of Laws of the United States, Title 28, Sections 41 (28), 43-48, which confer upon the District Courts of the United States jurisdiction of suits to enjoin, set aside, annul or suspend, in whole or in part, any order of the Commission. The venue is laid in the Southern District of New York pursuant to 28 U. S. C. A. Sec. 43. The order of the Commission herein sought to be enjoined, set aside, annulled and suspended was made in a proceeding instituted upon the Commission's own motion and not upon the petition of any party and relates in part to transportation and in part to matters other than transportation. The transportation to which said order relates occurs in part in said Southern District of New York. Plaintiffs, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, and The New York Central Railroad Company each have their principal offices or principal operating offices in said Southern District of New York.

IV

The proceeding before the Commission in which the order herein complained of was made and which order plaintiffs herein seek to have enjoined, set aside, suspended and annulled, was one of the several numbered and separate parts of a general investigation, instituted by the

[fol. 8]

Commission of its own motion into Practices of Carriers Affecting Operating Revenues or Expenses, which was designated as Ex parte No. 104. All common carriers by railroad subject to the Interstate Commerce Act, including plaintiffs and each of them, were made respondents in said general investigation. A true and correct copy of the order of the Commission entered on July 6, 1931, instituting said investigation, marked Exhibit "A", is attached hereto and made a part hereof as fully as though set forth at length herein. Said order specified that said investigation would be "assigned for hearing at such times and places and with respect to such practices as the Commission may hereafter direct".

V

On January 6, 1932, the Commission, by its notice, a true and correct copy of which, marked Exhibit "B", is attached hereto and made a part hereof as fully as though set forth at length herein, instituted as Part 6 of said Ex Parte 104 an inquiry which, as stated in said notice was

"... directed toward establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, namely the carriers to which this notice is addressed, hereinafter termed respondents."

[fol. 9] Plaintiffs and each of them were named as respondents in said notice.

VI

The Commission, from time to time, held hearings in said part of said investigation, thereafter by it designated as "*Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part 6, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y.*", hereinafter called the "proceeding." At said hearings evidence was adduced by the Commission and by plaintiffs and other respondents. Numerous other parties also appeared at said hearings and, pursuant to the Rules of Practice of the Commission, became parties to said proceeding by such appearance. Many of said other parties adduced evidence.

VII

On December 12, 1933, the Commission made its report (198 I. C. C. 134) in said proceeding, a true and correct copy of which, marked Exhibit "C", is attached hereto and made a part hereof as fully as though set forth at length herein.

Said report of the Commission purported to find, generally, that certain warehousing practices of respondent carriers (plaintiffs herein) result in violations of Sections 2, 3 and 6 of the Interstate Commerce Act and expressed the opinion that there was reasonable ground for belief [fol. 10] that provisions of the Elkins Act (49 U. S. C. A. Secs. 41-43) were also being violated.

The Commission entered no order, but "admonished" plaintiffs "to take prompt corrective action".

VIII

On May 6, 1935, the Commission entered its further order in said proceeding, a true and correct copy of which, marked Exhibit "D", is attached hereto and made a part hereof as fully as though set forth at length herein. By said order, the Commission reopened said proceeding "for the purpose of bringing the record down to date" and assigned said proceeding for further hearing.

IX

On May 6, 1935, the Commission also issued, concurrently with entry of the order referred to in the last preceding paragraph hereof, a "notice of information to be sought at reopened hearings", a true and correct copy of which, marked Exhibit "E", is attached hereto and made a part hereof as fully as though set forth at length herein.

X

Pursuant to said order and notice, the Commission from time to time held further hearings in said proceeding at which the Commission, plaintiffs and other parties adduced evidence.

[fol. 11]

XI

On June 8, 1936, the Commission made its report on further hearing (216 I. C. C. 291) in said proceeding, a true

and correct copy of which, marked Exhibit "F", is attached hereto and made a part hereof as fully as though set forth at length herein.

In said report (Chairman Mahaffie dissenting in part) the Commission substantially confirmed its prior report, and made certain findings directed to the practices of all or several of the plaintiffs herein, which findings, without admitting the validity thereof, plaintiffs summarize as follows:

(a) Plaintiffs, directly or indirectly, own, hold or control a number of warehouses, buildings and piers in the Port of New York District. Plaintiffs, by leases and other arrangements, provide space in said warehouses, buildings and piers for numerous persons, many of whom ship property in interstate commerce over plaintiffs' railroads. The rentals and other charges which plaintiffs collect for the use of space as aforesaid do not compensate plaintiffs for the "cost" of providing the space, in that they fail to make plaintiffs whole for interest paid for the use of, or a fair return on, the capital they have invested (directly or indirectly) in said buildings, warehouses and piers, and for depreciation, taxes, repairs and other necessary expenses. Plaintiffs, by so providing space at less than such "cost," [fol. 12] assume a part of the cost of conducting the commercial operations of the shippers who occupy such space.

(b) Other shippers for whom plaintiffs likewise transport property over their railroads in interstate commerce, are unable to, or for other reasons do not, use the space provided by plaintiffs as outlined in the last preceding subparagraph hereof. Such other shippers, on the contrary, provide their own space or obtain the use of space from persons other than plaintiffs. Such other persons are warehousemen who compete with plaintiffs in the providing of space. Plaintiffs do not assume any of the expense which such other shippers incur in obtaining space.

(c) Plaintiffs, by providing, at less than "cost", space used by certain shippers, assume part of the costs of conducting the commercial operations of such shippers as outlined in sub-paragraph (a) above. Plaintiffs thus reduce, below the published tariff rates, the transportation charges paid by such shippers and grant concessions to such shippers. Such reductions and concessions amount to the difference between the "cost" to plaintiffs of providing said space, and the amount which plaintiffs receive. Therefore,

plaintiffs are guilty of unjust discrimination, in violation of Section 2 of the Interstate Commerce Act; of making and giving undue and unreasonable preferences and advantages to the shippers to whom they provide space and of unduly prejudicing the shippers to whom they do not provide space, in violation of Section 3 of said Act; and further are guilty of departing from their duly published tariff rates and charges, in violation of Section 6 of said Act. Furthermore, there is reason to believe that the concessions, which plaintiffs so grant to shippers, are "rebates", in violation of the Elkins Act.

(d) Plaintiffs, by their tariffs, provide so-called "storage in transit" of property moving over their railroads in interstate commerce from and to said Port of New York District. The tariff rates and charges therefor are less than the "cost" to plaintiffs of providing such storage. Such storage services are of a "voluntary" or "commercial" nature and are not "transportation" as the latter term is defined in Section 1, Paragraph 3 of the Interstate Commerce Act. Therefore, they are not services which plaintiffs may, by their published tariffs, lawfully hold themselves out to perform. Plaintiffs should cancel all tariffs or parts thereof by which they hold themselves out to perform any and all "in transit" storage services.* Plaintiffs also provide other storage services, not "in transit", which are likewise of a "voluntary" or "commercial" nature. All such storage services, whether "in transit" or otherwise, are to be distinguished from "involuntary" storage (which latter is of necessity provided by carriers from time to time when shippers or consignees fail to remove property from freight stations). In providing all such storage services (other than "involuntary" storage) plaintiffs engage in "commercial warehousing". The rates and charges which plaintiffs collect for such "commercial warehousing" do not fully compensate plaintiffs for the "costs" of the services performed. In so doing, plaintiffs violate Sections 2, 3 and 6 of the Interstate Commerce Act, and probably violate the Elkins Act, for the same reasons as are outlined in sub-paragraph (c) above.

* This finding was rescinded in the last report of the Commission, as shown in Paragraph XVII hereof.

(e) Plaintiffs, by their tariffs, also provide for handling, into and out of storage, property stored, "in transit" or otherwise, under circumstances that constitute "commercial warehousing". Plaintiffs* also provide for the insuring of property while stored "in transit". Such services of handling and insuring are not "transportation" within Section 1 (3) of the Interstate Commerce Act but are commercial services which may not lawfully be included in plaintiffs' tariffs.† Plaintiffs provide such services at less than "cost" and, in so doing, violate Sections 2, 3 and 6 [fol. 15] of the Interstate Commerce Act, and probably violate the Elkins Act, in the manner and for the reasons summarized in sub-paragraph (c), above.

Certain parts and findings of said report were addressed particularly to the business of individual plaintiffs. As to plaintiffs, The Baltimore and Ohio Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company and The Pennsylvania Railroad Company said findings were in substance as hereinabove stated in sub-paragraphs (a) to (e) inclusive. As to plaintiffs, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company and The New York Central Railroad Company, in addition to the foregoing general findings, further specific findings, as to which special grounds of unlawfulness are hereinafter alleged, were made, as follows:

1. Such particular findings (the validity of which is not admitted) were, as to plaintiff, The Central Railroad Company of New Jersey, that:

(a) The Newark Warehouse Company is a wholly owned and controlled subsidiary of said plaintiff and the said plaintiff dominates and controls the Warehouse Company and uses it as an adjunct of its traffic department, the Warehouse Company being in effect a part of the said plaintiff.

(b) Said plaintiff, through its said wholly owned sub-[fol. 16] sidiary, permits the occupancy, by the Newark Central Warehouse Company, of a warehouse under leasing

* Other than The Central Railroad Company of New Jersey.

† This finding was rescinded in the last report of the Commission, as shown in Paragraph XVII hereof.

arrangements which fail to compensate said plaintiff for its "cost" in providing space in said warehouse.

(c) The Newark Central Warehouse Company is a shipper in interstate commerce, and stores goods for shippers in interstate commerce in competition with certain other warehouse companies who are also shippers in interstate commerce and who store goods for other shippers in interstate commerce over the lines of said plaintiff in the Port of New York District. The said plaintiff, through leasing arrangements with the Newark Central Warehouse Company, bears directly a portion of the expense of commercial operations of the latter company, and indirectly a portion of the expense of commercial operations of the shippers who store goods with the latter company. The said plaintiff does not bear any portion of the expense of commercial operations of the competing warehouse companies or of shippers who store goods with such warehouse companies.

(d) By reason of the leasing arrangements above stated, plaintiff, The Central Railroad Company of New Jersey, is guilty of unjust discrimination in violation of Section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the Newark [fol. 17] Central Warehouse Company and to shippers who store goods therewith, and subjects competing warehouse companies and shippers who store goods with such warehouse companies to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act, and departs from its published tariff rates in violation of Section 6 of the Interstate Commerce Act.

2. Such particular findings (the validity of which is not admitted) were, as to plaintiff, Lehigh Valley Railroad Company, that:

(a) Said plaintiff makes leases of space on its piers in Jersey City, N. J., to flour shippers which enable such shippers to avoid tariff storage charges, and bears the expense of unloading flour it transports into leased space and of reloading it when it is distributed from such space, but does not bear the expense of such unloading and reloading when the flour is stored in private warehouse space and distributed therefrom, and that said plaintiff has not been willing to discontinue the practice of making such leases, and does not make such leases to other competing flour shippers.

Said plaintiff, through the practices and acts described in connection with the leasing of space, assumes a part of the cost of conducting commercial operations of such lessee shippers, but does not bear any portion of the expense of conducting the commercial operations of competing ship-[fol. 18] pers, and by so doing grants unlawful concessions to such lessee shippers and reduces below its published tariff rates the transportation charges paid by said shippers, and thereby is guilty of unjust discrimination in violation of Section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages in violation of Section 3 of said Act and departs from its published tariffs in violation of Section 6 of said Act.

3. Such particular findings (the validity of which is not admitted) were; as to plaintiff, The New York Central Railroad Company, that:

(a) Said plaintiff leases warehouse space to J. A. Mellish Warehouse Company, Incorporated, and Kingsbridge Auto Storage & Warehouse Company, "shippers in interstate commerce" over said plaintiff's railroad, at rental charges which fail to compensate said plaintiff for the "cost" of providing said space. Plaintiff thereby assumes a portion of the expense of commercial operations of said companies.

(b) "Certain other warehouse companies, likewise shippers in interstate commerce over the New York Central", are located in the Port of New York District and are competitors of the Mellish Company and Kingsbridge Company. Said plaintiff does not assume any of the expense of the commercial operations of said competing warehouse companies.

[fol. 19] (c) Mellish Company and Kingsbridge Company unload and handle automobiles for said plaintiff and receive allowances therefor. Said services of unloading and handling are commercial services, not within the obligation of said plaintiff to perform under its line-haul rates, and the allowances therefor constitute concessions from such rates.

(d) By reason of the matters stated, plaintiff, The New York Central Railroad Company, is guilty of unjust discrimination in violation of Section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to Mellish Company and Kings-

bridge Company in violation of Section 3 of said Act, and departs from its published tariff rates in violation of Section 6 of said Act.

XII

On the same date, the Commission entered its order in said proceeding, a true and correct copy of which, marked Exhibit "G", is attached hereto and made a part hereof as fully as though set forth at length herein. By said order, plaintiffs and each of them were required, on or before October 1, 1936, to conform with the findings expressed in said report of the Commission on further hearing, and to cease and desist from the alleged violations of law therein set forth.

[fol. 20]

XIII

Thereafter, plaintiffs filed with the Commission in said proceeding a joint and several petition for rehearing, reargument and reconsideration, dated August 29, 1936, a true and correct copy of which, marked Exhibit "H", is attached hereto and made a part hereof as fully as though set forth at length herein, in which plaintiffs advanced substantially the same reasons against the lawfulness of the reports and order of the Commission as are hereinafter, in this petition, set forth.

Plaintiffs, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, and The New York Central Railroad Company, also filed separate petitions for rehearing reargument and reconsideration, true and correct copies of which, marked, respectively, Exhibits "I", "J" and "K", are attached hereto and made parts hereof as fully as though set forth at length herein, wherein the separate reasons advanced by each of them against said reports and order were substantially the same as those which, as to each of them, are in this petition hereinafter more particularly set forth.

Said petitions contained offers by plaintiffs and each of them to prove that the rentals and other charges collected by them for leasing space and for storing, handling and insuring goods were and are not less than the prevailing market values of the leases and services in question.

[fol. 21]

XIV

On August 28, 1936, the Commission, pending the petitions referred to in the last preceding paragraph hereof, and

upon the request of plaintiffs, theretofore made, entered its further order, a true and correct copy of which, marked Exhibit "L," is attached hereto and made a part hereof as fully as though set forth at length herein, whereby the effective date of the order of June 8, 1936, was postponed until December 1, 1936.

XV

On October 12, 1936, the Commission, upon the petitions of plaintiffs as referred to in paragraph XIII hereof, entered its further order, a true and correct copy of which, marked Exhibit "M", is attached hereto and made a part hereof as fully as though set forth at length herein. By said order the Commission, upon further consideration, reopened said proceeding for reargument and reconsideration (but not for rehearing) and, pending such reconsideration, postponed to February 1, 1937, the effective date of the order entered on June 8, 1936.

XVI

On December 23, 1936, the Commission, upon its own motion, entered its further order, a true and correct copy of which, marked Exhibit "N", is attached hereto and made a part hereof as fully as though set forth at length herein. By [fol. 22] said order the Commission postponed until April 1, 1937, the effective date of the order entered in said proceeding on June 8, 1936, and referred to in Paragraph XII hereinabove.

XVII

On February 2, 1937, following oral argument held pursuant to the order referred to in Paragraph XV hereof, the Commission made its further report on argument and reconsideration, a true and correct copy of which, marked Exhibit "O", is attached hereto and made a part hereof as fully as though set forth at length herein. By said report, the Commission, reversing its two prior reports in this respect, found that the so-called "in-transit" storage and the handling and insuring of property incidental thereto (as referred to in Paragraph XI (d), (e), pages 9-11 hereinabove), were and are in fact services for which tariff publication is necessary, but that such charges violate Sections 2, 3 and 6 of the Interstate Commerce Act and the Elkins Act unless they return to plaintiffs the aforesaid "cost" of such services. In all other respects, however, the findings made

in the report of June 8, 1936, as hereinabove set forth in Paragraph XI, were affirmed. The Commission did not grant plaintiffs any opportunity to prove the prevailing market values of leases and services as proffered in plaintiffs' petitions.

[fol. 23]

XVIII

On the same date, the Commission entered its further order in said proceeding, a true and correct copy of which, marked Exhibit "P", is attached hereto and made a part hereof as fully as though set forth at length herein. Said order, which is the order herein sought to be enjoined, set aside; suspended and annulled, superseded the order previously entered on June 8, 1936. By said order, which incorporated by reference the reports of December 12, 1933 (198 I. C. C. 134), attached as Exhibit "C" hereto; June 8, 1936 (216 I. C. C. 291), attached as Exhibit "F" hereto; and February 2, 1937, — I. C. C. —, attached as Exhibit "O" hereto, plaintiffs and each of them (by the Commission designated as "respondents") were notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain:

(a) " . . . from permitting shippers in interstate commerce over said respondents' lines to occupy space by lease or otherwise" in warehouses, buildings or piers, *"at rates and charges which fail to compensate said respondents for the cost of providing said space;*

(b) " . . . from storing goods shipped over said respondents' lines in interstate commerce, or providing storage space to shippers . . . for commercial storage of goods . . . *at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space;*

(c) " . . . from directly or indirectly handling goods incident to commercial storage . . . *at said warehouses, buildings or piers for shippers . . . at rates [fol. 24] and charges which fail to compensate said respondents for the cost of said handling;*

(d) " . . . from insuring goods shipped over said respondents' lines in interstate commerce and stored in connection with commercial warehousing . . . *at said*

warehouses, buildings or piers . . . at less than the cost of providing such insurance;

(e) " . . . from applying, by means of tariffs now on file with this Commission . . . *noncompensatory rates and charges* . . . for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service." (Italics ours.)

And the plaintiff Central Railroad Company of New Jersey was specifically ordered and

(f) " . . . notified and required to cease and desist . . . from subsidizing and granting concessions to the Newark Central Warehouse Company by means of *non-compensatory rentals* collected or received for the space leased by the Newark Central Warehouse Company from said . . . carrier."† (Italics ours.)

XIX

Plaintiffs and each of them allege that the said order of the Commission of February 2, 1937, Exhibit "P" hereto, is unlawful and void for the following reasons:

[fol. 25]

A

The reports and findings of the Commission upon which said order is based, and which are incorporated therein by reference, conclude that plaintiffs, and each of them, are guilty of giving unlawful concessions or rebates to certain shippers and, by reason of such concessions, are further guilty of unjust discrimination in violation of Section 2 of the Interstate Commerce Act; make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce in violation of Section 3 of said Act; and depart from their published tariffs in viola-

† The order also contains an additional paragraph relating exclusively to alleged excessive rentals paid for space in a certain building in Jersey City leased to plaintiff, Erie Railroad Company, by Seaboard Terminal and Refrigeration Company. The validity of this paragraph of the order is not brought in issue in this petition.

tion of Section 6 of said Act. Said order is without foundation in law and is based upon an error of law, exceeds the regulatory powers of the Commission and is arbitrary and capricious, in that:

(1) Said order rests upon the determination of the Commission that unlawful concessions are made and unlawful discriminations or preferences are granted or practiced in favor of some shippers and against other shippers, whenever some shippers, but not others, lease or use property, or receive services, from plaintiffs at less than the "cost" of providing the same; it being required by said order that such "cost" shall be computed upon the comprehensive basis stated in the Commission's said reports (Exhibits "C", "F" and "O" hereto) and shall include interest or return on investment, depreciation, taxes, repairs and all other expenses;

[fol. 26] (2) Said order fails to recognize that leases made and storage and handling services rendered by plaintiffs must be, and lawfully may be, made and rendered by plaintiffs at the prevailing market rents, rates and charges therefor;

(3) The evidence before the Commission does not show, and the Commission did not find, that the prevailing rents, rates and charges for comparable leases, storage and handling services are sufficient to cover such "cost";

(4) The evidence before the Commission did not show, and the Commission did not find, that the rents, rates and charges of plaintiffs are in and of themselves less than just and reasonable;

(5) Said order fails to recognize that the several plaintiffs must necessarily make leases of space and perform storage and handling services at different and varying costs, and that the plaintiff or plaintiffs having the higher cost cannot exact from shippers, and shippers are unwilling to pay, more than the prevailing market value; and

(6) Said order wholly disregards, and does not purport to find, the prevailing market values of the space covered by plaintiffs' said leases, or of the storage and handling services rendered by plaintiffs.

[fol. 27] On the contrary, the Commission rejected the joint and several offers, made by plaintiffs in their petitions

for rehearing, etc., Exhibits "H", "I", "J" and "K" hereto attached, to prove that plaintiffs were and are demanding and receiving, for the leases, uses of property and services in question, not less than the prevailing market values thereof.

B

Said order, in so far as it seeks to prohibit plaintiffs and each of them from leasing their property, or permitting the use thereof, or rendering services, at rates and charges that are less than such "cost" thereof deprives plaintiffs of their liberty and property without due process of law and takes their property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States, in that the requirement of said order, that plaintiffs fix rentals that will return them such "cost", will result in minimum permissible rentals so high that plaintiffs will not be able to find tenants and will be compelled to permit their properties to become unoccupied and useless.

C

Said order is broader and more comprehensive in its terms than are the findings upon which said order purports to be based and, as to all subject matter not specifically [fol. 28] named in said findings, is null and void because it was made without proper findings, was made without evidence, is unsupported by findings or evidence and is capricious and arbitrary. The first five ordering paragraphs of said order, as summarized in subparagraphs (a) to (e) inclusive of Paragraph XVIII hereof, attempt to prohibit plaintiffs and each of them, absolutely and without qualification, from leasing space, providing storage space, handling goods incident to storage, insuring goods stored, or any or all of them, all as more fully set forth therein, "at rates and charges which fail to compensate [plaintiffs] for the cost" thereof, or at "noncompensatory" rates or charges. The prohibitions thus sought to be imposed include all acts of the kinds specified, at all times, in the "Port of New York District" and apply and purport to apply with equal force on the one hand to acts that may be the subject of the Commission's findings and of evidence before the Commission and, on the other hand, also to similar acts, if any there be, that are not the subject of the Commission's findings and of evidence adduced before it.

Said order thereby attempts, absolutely and in general terms and without qualification, to prohibit plaintiffs and each of them, upon the pain of the heavy penalties provided in the Interstate Commerce Act for violation of orders of the Commission, forever from doing any or all of the things referred to in said order. The Commission is an administrative [fol. 29] tribunal which may not enter orders except upon proper findings and evidence; and it is without power to enter a general prohibitory order that includes matters outside its findings and outside the evidence properly adduced before it.

D

Said order does not set forth any definite requirements for compliance therewith and is so indefinite and uncertain that plaintiffs are, and will continue to be, unable to determine what requirements they must meet in order to comply with said order. The order in substance requires that plaintiffs shall not lease or allow the use of property, or perform services, at less than the aforesaid "cost". The order does not, either by definition or by application to particular situations, inform plaintiffs with certainty what is meant by "cost", although its effect will be to make them subject to the heavy penalties provided in the Interstate Commerce Act whenever and wherever in said Port of New York District they may lease or allow the use of the kinds of property or render the kinds of service described in said order at less than such "cost". The standard of "cost", to which said order purports to require plaintiffs to adhere is an indefinite and uncertain standard into which many and varying elements necessarily enter. It must inevitably vary [fol. 30] from time to time, depending upon the location and other characteristics of the space leased, and upon the nature, volume and other characteristics of each commodity stored or handled. It is utterly impossible of practical application by plaintiffs and is, therefore, capricious and arbitrary.

XX

Plaintiff, The Central Railroad Company of New Jersey, further alleges that the said order of the Commission, especially the last paragraph thereof which provides:

"And it is further ordered, That respondent, The Central Railroad Company of New Jersey, be, and it is hereby, notified and required to cease and desist, on or before April

15, 1937, and thereafter to abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports"

is unlawful and void as applied to said plaintiff in that:

A

It rests upon an error of law for the reasons hereinabove more fully set forth in Paragraph XIX hereof.

[fol. 31]

B

Said last paragraph of the order rests on an error of law in that, if the plaintiff is required to secure as rental for the said warehouse an amount not less than the sum of the taxes, depreciation, and even a 4% return on the investment, the resulting minimum permissible rental would eliminate any possibility of finding a tenant for the said warehouse and would place the plaintiff in a position of being required to permit the premises to be unoccupied without any rental whatever and this would amount to taking the property in violation of the Fifth Amendment to the Constitution of the United States.

C

Said last paragraph of the order is arbitrary, and is not supported by adequate findings, and was made without proper findings, and is unsupported by the findings and evidence.

D

The finding of the Commission that said plaintiff uses the Newark Warehouse Company as an adjunct of its traffic department was made without any substantial evidence to justify such finding and is unsupported by the evidence.

[fol. 32]

E

The finding of the Commission that "the Newark Central Warehouse Company is a shipper in interstate com-

merce" was made without any substantial evidence to justify such finding and is unsupported by the evidence.

F

The finding of the Commission that the Newark Central Warehouse Company stores goods in competition with other warehouses which are shippers in interstate commerce and who store goods for shippers in interstate commerce over the lines of said plaintiff was made without any substantial evidence to justify such finding and is unsupported by the evidence and is arbitrary in that there was no evidence before the Commission that disclosed that any warehouse companies that ship goods in interstate commerce were competitors of the Newark Central Warehouse Company, or that any such warehouse companies stored goods for other shippers in interstate commerce over the said plaintiff's railroad.

G

The finding of the Commission that the said plaintiff "through leasing arrangements with the Newark Central Warehouse Company, . . . bears directly a portion [Vol. 33] of the expense of commercial operations of the latter company, and indirectly a portion of the expense of commercial operations of the shippers who store goods with the latter company,"

was made without any substantial evidence to justify such finding and is unsupported by the evidence and is arbitrary since it is founded on an assumption, for which there is no basis in the evidence, that the leasing arrangements enabled the said Newark Central Warehouse Company to store goods more cheaply than other warehouses and that shippers who stored goods in said Newark Central Warehouse were permitted to do so at rates which were less than those prevailing in other warehouses in the vicinity.

H

The finding of the Commission that traffic considerations were the moving cause of the plaintiff's subsidiary entering into the lease with the Newark Central Warehouse Company was made without any substantial evidence to justify such finding and there is no evidence which would justify the Commission in so finding. On the contrary, it appears

from the reports of the Commission that the purpose of the plaintiff in leasing the warehouse through its subsidiary was to avoid the huge deficits which were incurred by the operation of the said warehouse, and that such was the [fol. 34] motive of entering into the lease is borne out by the fact that the efforts to lease or to find a purchaser were not confined to those persons who would use the building as a warehouse but included efforts, among others, to lease the building as a public garage.

I

The Commission acted arbitrarily in failing to grant plaintiff's motion of November 21, 1936, referred to in Paragraph XIII, Exhibit "I" hereto, wherein plaintiff moved that the order of June 8, 1936, in so far as it affected the lease of the Newark Warehouse should be rescinded or, in the alternative, that a further hearing be granted at which the plaintiff should be given an opportunity to produce additional evidence. That the Commission's treatment of said motion was lacking in due process is indicated by the fact that in the order dated February 2, 1937, no mention whatever is made of said motion although printed copies thereof were filed with the Commission and an oral argument was had thereon at the argument on November 23, 1936, and so far as this plaintiff is advised the Commission has not yet acted on said motion.

J

Said last paragraph of the order does not set up any definite requirements for compliance therewith and is so [fol. 35] indefinite and uncertain that the plaintiff is unable to determine what requirements it must meet to comply with said order. Said order does not by definition or application to the particular situation inform the plaintiff what would be a "compensatory" rental for the space leased although it threatens said plaintiff with the heavy penalties provided for in the Interstate Commerce Act should the plaintiff continue in effect the lease of said property. The standard is so indefinite and uncertain and involves so many elements which vary from time to time that it is utterly impossible of practical application by the plaintiff and is therefore arbitrary.

XXI

Plaintiff, Lehigh Valley Railroad Company, further alleges that the said order of the Commission is unlawful and void, as applied to it; in that,

A

The Commission's findings that said plaintiff is guilty of a violation of Sections 2, 3 and 6 of the Interstate Commerce Act by reason of the rents it charges and of its acts and practices in connection with the leasing of space are unsupported by evidence, are contrary to the evidence and arbitrary and capricious in that the evidence before the Commission does not show and the Commission did not find [fol. 36] that any shipper or other person has been denied or refused full opportunity to lease space in any of said plaintiff's buildings, or that any lease or leases made by said plaintiff actually damaged or injured any shipper or other person or violated any rights of any shipper or other person under the Interstate Commerce Act or otherwise.

B

The Commission's findings that said plaintiff is guilty of violating Sections 2, 3 and 6 of the Interstate Commerce Act by reason of leasing space on its piers in Jersey City to flour shippers which enables them to avoid tariff storage charges and by reason of said plaintiff's practice of handling flour shipments into and out of such shippers' leased space but not into and out of space occupied by flour shippers in other locations (referred to in Paragraph XI, 2 (a) above) is unsupported by evidence, is contrary to the evidence and arbitrary and capricious in that the evidence before the Commission does not show and the Commission did not find that avoidance of tariff storage charges by means of such leases is unlawful, or that flour shippers occupying leased space and flour shippers occupying space in other locations are similarly situated, or that the services accorded by said plaintiff to said two classes of flour ship-[fol. 37] pers are in any essential respect different in amount or value.

C

The Commission's finding that said plaintiff in providing insurance at 8 cents per \$100 valuation per year on west-

bound freight stored in transit does so at less than the cost of providing such insurance is unsupported by evidence, is contrary to the evidence, is contrary to the Commission's own findings and is arbitrary and capricious in that the evidence before the Commission affirmatively shows and the Commission's findings (See Exhibit "F", p. 354) established that said rate of 8 cents yielded to said plaintiff a revenue substantially in excess of the cost to said plaintiff of providing said insurance service.

XXII

Plaintiff, The New York Central Railroad Company, further alleges that the said order of the Commission is unlawful and void, as applied to it, in that:

A

The finding of the Commission that Mellish Company and Kingsbridge Company are "shippers in interstate commerce" over said plaintiff's line was made without evidence, is unsupported by evidence and is capricious and arbitrary [fol. 38] in that the evidence before the Commission does not show that said Mellish Company or Kingsbridge Company is a shipper but shows, on the contrary, that said companies are not such shippers.

B

The Commission's findings of "cost" to said plaintiff of the warehouse space leased to Mellish Company and Kingsbridge Company (referred to in Paragraph XI-3-(a) hereinabove) are contrary to the evidence, unsupported by evidence, arbitrary and capricious in that the evidence before the Commission showed that the buildings in which said warehouse space is contained are used in part as regular freight stations of said plaintiff. The Commission, in disregard of said evidence, charged the entire cost of owning, holding and operating said buildings, without any deduction for those parts used as freight stations, as part of the "cost" of the warehouse space leased to said companies by said plaintiff.

C

The Commission's finding, that the leases by said plaintiff to Mellish Company and Kingsbridge Company of ware-

house space "at rental charges which fail to compensate . . . for the cost of providing such space", contravene Sections 2, 3 and 6 of the Interstate Commerce Act, are without foundation in law, are based upon an error [fol. 39] of law and the order based thereon deprives said plaintiff of its liberty and property without due process of law and takes the property of said plaintiff for public use without just compensation, for the reasons hereinabove more fully stated in Paragraph XIX, Subdivisions A and B, hereinabove.

D

The finding of the Commission that "certain other warehouse companies, likewise shippers in interstate commerce over the New York Central . . . are competitors" of Mellish Company and Kingsbridge Company, was made without evidence, is unsupported by evidence and is capricious and arbitrary in that the evidence before the Commission does not disclose that any warehouse companies that ship in interstate commerce are engaged in business in the Port of New York District in competition with the Mellish Company and the Kingsbridge Company.

E

The finding of the Commission that the services of unloading and handling automobiles performed for plaintiff by Mellish Company and Kingsbridge Company "are commercial services not within the obligation of said railroad to perform under its line haul rates" and that "allowances therefor constitute concessions from such rates", was made [fol. 40] without evidence, is unsupported by evidence and is based upon an error of law, in that said plaintiff, by its duly published tariffs, undertakes to perform and is obliged to perform the said services of unloading and handling automobiles. Plaintiff here asserts, and the Commission does not deny, that the allowances granted by said plaintiff to Mellish Company and Kingsbridge Company are not in excess of the reasonable allowances that may lawfully be paid to said companies under Section 15, Paragraph 13 of the Interstate Commerce Act even if said companies were shippers.

XXIII

Said order requires that plaintiffs cease and desist, on or before April 15, 1937, and thereafter abstain, from per-

mitting shippers to occupy space by lease or otherwise, from providing storage space to shippers for commercial storage of goods, from handling goods incident to commercial storage, from insuring goods shipped over plaintiffs' lines in interstate commerce and stored in connection with commercial warehousing, or any or all of them, at less than the "cost" of providing such lease, use or service and requires plaintiff, The Central Railroad Company of New Jersey, to cease and desist from "subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals" as described in the [fol. 41] Commission's reports. Should they be required to put said order into effect, plaintiffs, even if said order should later be set aside as unlawful, would be forced to terminate valuable leases, contracts and other arrangements; from all of which plaintiffs would suffer irreparable injury and damage for which there is no remedy at law. Plaintiffs, although they firmly believe, and are so advised by counsel, that the said order is unlawful and void, may not, nevertheless, safely continue their present leases, contracts, arrangements and practices in disregard of said order for, if plaintiffs should do so and the order should thereafter be held valid in any respect, plaintiffs and each of them would be subject to the heavy penalties of five thousand (\$5000) dollars for each day each violation thereof may continue, as provided in Section 16(8) of the Interstate Commerce Act.

All of the matters herein alleged, plaintiffs and each of them offer to prove.

Wherefore, Plaintiffs, being without adequate remedy at law, respectfully pray:

First. That upon the filing of this petition, the presiding Judge of this Court shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge;

[fol. 42] Second. That process may issue against the defendant, The United States of America;

Third. That after not less than three days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and a temporary stay or suspension of the

said order of the Interstate Commerce Commission be issued, pending hearing and determination of plaintiffs' application for interlocutory and permanent injunctions, for a duration of sixty days from April 15, 1937, the effective date of the said order;

Fourth. That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and an interlocutory injunction be issued, staying and suspending the said order of the Interstate Commerce Commission;

Fifth. That upon final hearing of this cause, a permanent injunction shall be issued, decreeing that said order of the Commission is null and void and is set aside, suspended and annulled, and that its enforcement, execution and operation shall forever be enjoined, and that the United States shall forever be restrained from taking any steps or instituting or further prosecuting any proceeding to enforce the said order.

[fol. 43] Sixth. That this Court grant to the plaintiffs such other and further relief as by it may be deemed proper in the premises.

Respectfully submitted, Edwin H. Burgess, Solicitor
for Plaintiffs, Office and P. O. Address, 143 Liberty
Street, Borough of Manhattan, City of New York.
Charles R. Webber, Alex. H. Elder, Walter J.
Larrabee, M. B. Pierce, Thomas P. Healy, Carleton
W. Meyer, Guernsey Orcutt, Of Counsel.

March 9, 1937.

[fol. 44] *Duly sworn to by John J. Enderlin. Jurat omitted in printing.*

[fol. 45]

EXHIBIT "A" TO PETITION

(Referred to in Paragraph IV of Petition)

Order

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 6th Day of July, A. D. 1931.

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Sections 12 and 15(a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act will [which] affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

It is Ordered, That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

It is Further Ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

And it is Further Ordered, That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 47]

EXHIBIT "B" TO PETITION

(Referred to in Paragraph V of Petition)

Interstate Commerce Commission, Washington

January 6, 1932.

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or
ExpensesPart 6. Warehousing and Storage of Property by Carriers
at the Port of New York, N. Y.

Notice of Information to be Sought at Hearings

To The Baltimore and Ohio Railroad Company
 Brooklyn Eastern District Terminal
 Bush Terminal Company
 Central Railroad Company of New Jersey
 The Delaware, Lackawanna & Western Railroad Com-
 pany
 Erie Railroad Company
 Hoboken Manufacturers Railroad Company
 Jay Street Terminal
 Lehigh Valley Railroad Company
 Long Island Railroad Company
 The New York Central Railroad Company
 New York Connecting Railroad Company
 New York Dock Railway
 New York, New Haven & Hartford Railroad Com-
 pany
 New York, Ontario & Western Railroad Company
 The Pennsylvania Railroad Company
 Staten Island Rapid Transit Railway Company
 West Shore Railroad Company.

[fol. 48] At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July 1931, an order instituting on its own motion a proceeding of inquiry and investigation into Practices of Carriers Affecting Operating Revenues or Expenses was issued and served upon all common carriers by railroad subject to the interstate commerce act.

This part of the general inquiry is directed toward establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, namely, the carriers to which this notice is addressed, hereinafter termed respondents.

This notice is intended to inform respondents of the particular subjects, as nearly as may be, which will be considered in this part of the general inquiry, so that they may arrange in ample time to furnish the desired information at the hearings to be held at such times and places as the Commission may hereafter designate. These particular subjects are as follows:

(1) All warehousing or storage afforded or performed on or in the lands, piers, buildings, structures, cars and other facilities and equipment, owned, leased, used, held, or controlled directly or indirectly by respondents.

(2) The investments, direct or indirect, of respondents in lands, equipment and facilities used, or to be used, for such warehousing and storage or used in part for such warehousing and storage and in part for other purposes, and the return to respondents on such investments.

[fol. 49] (3) The return to respondents on investments, direct or indirect, by respondents in the securities of companies engaged, or proposing to engage, in said warehousing and storage.

(4) Loans, advances, labor, services, allowances, compensation and gratuities made or given, directly or indirectly, by respondents to others engaged, or intending to engage, in such warehousing and storage, and the purpose thereof and the return thereon.

(5) The costs and expenses of loading, unloading, handling, transferring, distributing, warehousing and storing freight assumed or borne, directly or indirectly, by respondents in connection with said warehousing and storage.

(6) Rents or other form of compensation paid, directly or indirectly, by respondents for the use of property devoted to such warehousing and storage.

(7) Rents or other form of compensation received, directly or indirectly, by respondents for the use of their

property leased or granted to others and devoted to such warehousing and storage.

(8) Storage-in-transit rules and privileges established or granted by respondents.

(9) Rules, rates, charges and practices involved in said warehousing and storage.

(10) All other practices involved in said storage and warehousing, and all other information which will enable the Commission to determine whether respondents have complied in connection therewith with the various provisions of the Interstate Commerce Act, or other Acts in addition or supplementary thereto.

NOTE.—Where the term “respondent” is used in this notice it should be understood as including, so far as may [fol. 50] be necessary or appropriate to the context, all corporations and interests subsidiary to or affiliated with respondents.

All correspondence and communications concerning this part of Ex Parte No. 104 should be addressed to Wm. H. Bonneville, Director, Bureau of Inquiry, Interstate Commerce Commission, Washington, D. C.

By the Commission.

George B. McGinty, Secretary.

[fol. 51]

EXHIBIT “C” TO PETITION

(Referred to in Paragraph VII of Petition)

Report of the Interstate Commerce Commission, Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part 6, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y., 198 I. C. C. 134, decided December 12, 1933, copy attached hereto.

[fol. 52]

19275

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

[fol. 53] Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Submitted July 13, 1933. Decided December 12, 1933

1. Respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district, found to dissipate their funds and revenues, not to be in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and not in the public interest. Certain of such practices, charges, and allowances of the individual respondents, cited in the report, found to result in violations of the Interstate Commerce Act and afford reasonable ground for the belief that the Elkins Act is violated. Respondents admonished to take prompt corrective action.
2. Carriers serving other ports and terminals admonished to adjust their practices and charges in conformity with the principles herein announced.

M. B. Pierce for Erie Railroad; Charles R. Webber for Baltimore & Ohio Railroad Company; Thomas P. Healy for New York Central Lines; Guernsey Orcutt for Pennsylvania Railroad Company; Bronson Jewell for New York, New Haven & Hartford Railroad Company; W. J. Larabee for Delaware, Lackawanna & Western Railroad Company; A. H. Elder for Central Railroad Company of New Jersey; E. H. Burgess for Lehigh Valley Railroad Company; R. A. P. Walker and Abner J. Grossman for Bush Terminal Railroad Company, respondents.

John J. Hickey for Warehousemen's Protective Committee; Warehousemen's Association of Port of New York; Cold Storage Warehousemen's Storage Association of Port

of New York; New Jersey Merchandise Warehousemen's Association; New York State Association of Refrigerated Warehouses; Association of Refrigerated Warehouses, Division of American Warehousemen's Association, and Marketmen's Association of Port of New York; H. D. Holt and S. G. Spear for American Warehousemen's Association, Merchandise Division. Arthur J. W. Hilly for city of New York, N. Y.; Julius Henry Cohen, Wilbur La Roe, Jr., and Frederick E. Brown for Port of New York Authority; Hiram C. Todd, Parker McCollester, and C. D. Williams for State of New York; Parker McCollester for Chamber of Commerce of State of New York and New York Produce [fol. 54] Exchange; W. H. Chandler and C. S. Nelson for Merchants Association of New York; J. A. Magill for Maritime Association of Port of New York; A. C. Welsh for Brooklyn Chamber of Commerce; D. L. Tilly for New York Dock Company.

Charles E. Cotterill for Fidelity Warehouse Company, American Dock Company, Pouch Terminal, Incorporated, Republic Storage Company, Incorporated, Beard's Erie Basin, Bush Terminal Company, New York Dock Company, and New York Warehouse, Wharf & Terminal Association, Incorporated; John F. Finerty for Brooklyn Eastern District Terminal; William J. Mathey for American Newspaper Publishers Association; Publishers Association of New York City, and Shippers Conference of Greater New York; Charles J. Austin for New York Produce Exchange; R. H. Goebel for Rubber Manufacturers Association; George F. Hichborn for United States Rubber Company; Kent B. Stiles for "Distribution and Warehouses"; J. H. Robert for New Haven Transit Stores Company, and Harry A. Smythe for New York State Insurance Department; Charles J. Fagg for Chamber of Commerce of city of Newark, N. J.; George T. Bell for Independent Warehouses, Incorporated; Samuel Silverman for city of Boston, Mass., and Boston Port Authority; Johnston B. Campbell and W. W. McCoubry for Boston Port Authority, Boston, Mass.; Charles E. Seal for Baltimore Association of Commerce, Baltimore, Md.; John Philip Hill and Hill, Ross & Hill for East Baltimore Business Men's Association of Baltimore; Francis W. Hill, Jr., and Hill, Ross & Hill for three railroad systems for Baltimore Committee of Baltimore, and H. W. Wills for Philadelphia Board of Trade, Philadelphia, Pa.

Report of the Commission

By the COMMISSION:

Exceptions to the proposed report were filed on behalf of respondents and certain warehouse interests, and the latter replied to respondents' exceptions. Oral argument was waived.

This is an investigation upon our own motion, into and concerning practices of carriers by railroad subject to the Interstate Commerce Act which affect operating revenues or expenses. For convenience the investigation has been divided into different parts. This part concerns the practice of railroads in the warehousing and storage of property in the Port of New York district. This practice was initially brought to our attention by complaints of warehouse operators located in the New York district that warehouses owned or controlled by the carriers, or in which they have financial interests, were being operated in a manner which precluded these complaining warehouses from obtaining much, if any, of the business; that the complaining warehouses [fol. 55] were losing much of their business to carrier or carrier-affiliated warehouses, and that they could no longer meet the competition of such warehouses. Prior and subsequent to the institution of this part of the investigation our Bureau of Inquiry made investigations the results of which were placed in evidence at the hearing by its witnesses. Prior to the hearings the carriers' serving the Port of New York district were informed that it was our purpose in this proceeding to inquire into, and that they should furnish information upon:

¹ The carriers are as follows: Baltimore & Ohio, Brooklyn Eastern District Terminal, Bush Terminal Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western, Erie, Hoboken Manufacturers Railroad, Jay Street Terminal, Lehigh Valley, Long Island, New York Central, New York Connecting Railroad, New York Dock Railway, New York, New Haven & Hartford, New York, Ontario & Western, Pennsylvania, Staten Island Rapid Transit Railway, West Shore Railroad. The evidence of record was confined to the seven respondents considered in this report.

(1) All warehousing or storage afforded or performed on or in the lands, piers, buildings, structures, cars and other facilities and equipment owned, leased, used, held, or controlled directly or indirectly by respondents.

(2) The investments, direct or indirect, of respondents in lands, equipment and facilities used, or to be used, for such warehousing and storage or used in part for such warehousing and storage and in part for other purposes, and the return to respondents on such investments.

(3) The return to respondents on investments, direct or indirect, by respondents in the securities of companies engaged, or proposing to engage, in said warehousing and storage.

(4) Loans, advances, labor, services, allowances, compensation and gratuities made or given, directly or indirectly, by respondents to others engaged, or intending to engage, in such warehousing and storage, and the purpose thereof and the return thereon.

(5) The costs and expenses of loading, unloading, handling, transferring, distributing, warehousing and storing freight assumed or borne, directly or indirectly, by respondents in connection with said warehousing and storage.

(6) Rents or other form of compensation, paid directly or indirectly, by respondents for the use of property devoted to such warehousing and storage.

(7) Rents or other form of compensation received, directly or indirectly, by respondents for the use of their property leased or granted to others and devoted to such warehousing and storage.

(8) Storage-in-transit rules and privileges established or granted by respondents.

(9) Rules, rates, charges and practices involved in said warehousing and storage.

(10) All other practices involved in said storage and warehousing, and all other information which will enable the Commission to determine whether respondents have complied in connection therewith with the various provisions of the Interstate Commerce Act, or other Acts in addition or supplementary thereto.

NOTE.—Where the term “respondents” is used in this notice it should be understood as including, so far as may be necessary or appropriate to the context, all corporations and interests subsidiary to or affiliated with respondents.

[fol. 56] Because of active competition and intimate relationship between the various North Atlantic ports, and the necessity of each port offering storage facilities, practices, and charges equal to those at other ports, a petition was filed on behalf of the Port of New York Authority to broaden the scope of the proceeding to include an investigation into the warehousing and storage charges and practices at the other North Atlantic ports, or, in the alternative, to institute independent and contemporaneous investigations into the warehousing and storage charges and practices at such ports. The Warehousemen's Protective Committee opposed the petition. We denied the petition without prejudice to its renewal at the conclusion of the hearings, which was done orally. It was later renewed in the brief. The American Warehouse Association, Merchandise Division, concurred therein. The Brooklyn Chamber of Commerce concurred in the petition insofar as it sought institution of an independent investigation at such other ports. It was again denied on October 3, 1932, at least until we should have considered and rendered a decision with respect to the warehousing situation at the port of New York.

The Boston Port Authority sought to introduce testimony at the hearing to prove that the practices at New York resulted in undue prejudice and unjust discrimination against the port of Boston, but because of our action on the petition just referred to and on objection of respondents, such testimony was not received. Later respondents' principal witnesses undertook to justify the practices at the port of New York because of the practices of carriers at other ports. Permission was thereupon granted the Boston Port Authority to introduce evidence to show the practices at the port of Boston for the purpose of refuting respondents' evidence that the practices at Boston and other ports justified the practices at the port of New York.

Commercial Warehouses

The commercial warehouse business has been an important factor in the conduct of this country's commerce for more than a hundred years. It has always been necessary for a tradesman, dealing in large quantities of merchandise either to provide and operate his own warehouse facilities or to use those provided by public warehousemen for the storage and distribution of his goods.

In the Port of New York district, the principal business solicited and performed by public warehousemen is the handling, storage, for long or short terms, and distribution of freight with all of the incidental services in connection therewith, such as issuance of warehouse receipts, inspection, cooperage, marking, weighing, and reshipping. Such [f6]. 57] services are performed on carload or less-than-carload quantities, and regardless of the form of transportation used in shipment or reshipment. Goods such as coffee, sugar, cocoa, cotton, rubber, and metals are stored in licensed warehouses and bought and sold on the various produce exchanges. Merchants and brokers oftentimes locate their business in the more active trading sections of the city where high rents preclude the use of space for storage of surplus stocks, and employ the warehousemen to store and distribute their goods. Assembling and distribution of carload lots is also an important function of the public warehousemen, permitting tradesmen to take advantage of lower rates in carloads than in less-than-carload lots. By various rules of the consolidated freight classification the trunk lines declare that they will neither load, unload, assemble, nor distribute carloads of goods which they transport at carload rates.

Respondent carriers subscribe to the consolidated freight classification containing classification rules which distinguish carload from less-than-carload service. See rules 14, 23, and 27. These rules, in connection with the provisions of the uniform bill of lading, the demurrage tariff, and the Jones storage tariff, provide guidance for simple and orderly terminal service on shipments of freight for which the storage service afforded is short and is a necessary step in the tendering of outbound shipments for transportation and the delivery of inbound shipments.

It is well understood that carload freight is carried at lower rates than those applying on less-than-carload lots,

and the private warehousemen contend that assuming that the respondents incorporate commercial warehousing and storage into their transportation service, which would require the building or operating of specialized warehouses, the result would be that the above rules would be without effect and that there would be little, if any, difference between their carload rates and their less-than-carload rates, and the application of the demurrage tariff and storage tariff would be doubtful.

At New York respondents now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies. The forms of title to the warehouses are various. In a number of instances the respondents lease all or parts of buildings for warehousing operations; in others they own the ground, aided in financing the structures located thereon, and lease from their own subsidiaries space in such buildings; and in still others they own the land and structures, but lease them in entirety or in large part to subsidiary corporations for warehouse operations. In the variety of such arrangements the result is always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purpose [fol. 58] poses railroad management may have in mind. These matters will be dealt with more fully when we consider the practices of individual respondents.

There are two kinds of storage, voluntary and involuntary. A witness for the independent storage warehouse interests defined those terms in the following manner:

Voluntary storage is that which is not contemplated by any condition incorporated in the uniform bill of lading. Such services are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangement and dealing with patrons of warehouses. Such services emanate from solicitation by the party who desires to perform the services and are voluntarily performed by him for hire or reward.

Involuntary warehousing and storage by carriers of freight which they transport for hire is a service incidental to transportation. Such storage is defined in certain provisions of the uniform bill of lading and results when the consignee does not accept delivery of his shipments promptly. The railroad is then compelled to store the goods at rates sufficiently high to compel the shipper to remove his

goods as quickly as possible in order to release the space or the car.

To summarize, one is a voluntary solicited service of a commercial warehouse concern engaged in trade activities, the other is the involuntary incidental service of the common carrier.

The warehouse interests generally are in accord in contending that respondents' storage rates are unduly low, and that thereby certain violations of law are brought about. The Warehousemen's Protective Committee, and those associated therewith, take the further position that the respondents are engaging in unauthorized and unlawful commercial warehousing, which they contend is a trade activity not embraced in common-carrier duty, and insist that the carriers should by our order be barred from directly or indirectly carrying on any commercial warehousing or storage business in competition with private warehouse companies. They feel that in a field of business requiring both transportation and storage of freight, the former should be performed by common carriers, and the latter, which they regard as commercial, by private interests.

The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charges for the two services. It is urged that if a railroad affords such warehousing and storage at unduly low rates as an inducement to the routing of traffic via its line, it subjects the independent warehouse companies to unfair competition.

Although the complaint originally seemed directed to the measure of the charges made by the carriers for their warehousing services, and a great deal of evidence was offered by private warehousing interests going to that matter, it was emphasized at the hearing that the real intent and purpose [fol. 59] pose of the complaining warehousemen is to get the carriers entirely out of the warehousing business.

Storage

Eastbound traffic.—Generally, all respondent carriers will store eastbound freight destined to New York and New York Harbor free-lighterage points, which is not delivered or ordered for delivery, and after the expiration of free time,

in public warehouses located within lighterage limits of New York Harbor, at the risk and expense of the owner; or will store it on their piers or in their own warehouses, or in cars at their terminal or holding yards, at the following rates for each 5-day period or fraction thereof beyond free time:

First six (6) periods (including handling in and out)	1 cent per 100 pounds.
Next six (6) periods	1.5 cents per 100 pounds.
Succeeding periods	2 cents per 100 pounds.

While the traffic is held in storage on piers or in warehouses of the railroad company, the responsibility of the carrier is that of a warehouseman only. While it is held in storage in warehouses not operated by the carrier, the custody and possession, as between carrier and consignee or owner, is that of the consignee or owner. No extra charge is made by the carriers for handling in and out of storage, such as is hereinafter described in connection with west-bound freight.

These rules and charges apply uniformly to all freight not given refrigerator car protection, except that flour is given special treatment, and except that the free time allowed before storage charges begin to accrue varies with regard to export and intercoastal freight. Flour in carloads shipped lighterage free, or consigned direct for station delivery, in New York or Brooklyn, or for official inspection by the New York Produce Flour Inspection Department, or when not so consigned and the railroad company receives notice from the consignor or owner not less than 24 hours before the date of arrival of the flour at the storage point, will be unloaded on arrival into carrier's warehouses or on piers at the intermediate storage point, and will be held free of storage for not exceeding 2 days, exclusive of the date of unloading from the cars to warehouses or piers, and thereafter the storage charges mentioned will be applied.

These storage charges apply to both domestic and export freight. However, the rules provide a period of 2 days' free time on domestic freight, whereas 15 days' free time is allowed on export freight handled on through export bills of lading issued in connection with steamship lines having agreements with the carriers for the issuance of through export bills of lading founded on written ocean contracts, 10 [fol. 60] days' free time on export freight not covered by

through export bills of lading, but consigned in the shipping order and bill of lading for export, and 5 days' free time on coastwise traffic. Flour is stored in cars pending delivery without charge. This will be referred to later.

Westbound traffic.—Westbound freight, in carloads, except restricted articles, forwarded from points within the free-lighterage limits of New York Harbor to rail termini or designated piers or warehouses, may be stored in transit at such piers and warehouses for a period not exceeding 12 months,² except unmanufactured tobacco, on which the period is 24 months,² from date of shipment from lighterage-free territory. If the shipment is reforwarded from transit point within the transit period, the rate in effect on date of shipment from point of origin in New York Harbor to final destination will apply, except that when reforwarded to points within the free-lighterage limits of New York Harbor the class rates specified in the tariffs from point of origin to the transit point, plus 9 cents per 100 pounds from transit point to destination, will apply. If shipped from transit point in less-than-carload quantities, 3.5 cents per 100 pounds is added to the rate from the point of origin to destination. Arrangements must be made in advance either with representatives of respondents for storage in or on railroad piers or warehouses, or with outside warehouses for storage therein. For storage in or on railroad piers or warehouses, the following charges apply:

	For first 30 days or less	For each succeeding 15 days or fraction
	Cents	Cents
Freight in barrels of 400 pounds or less.....	4.5	2.5 per barrel.
Freight in bags or sacks of 105 pounds or less..	1	² 0.5 per bag or sack.
Other freight in packages or pieces ¹	1.5	0.5 per 100 pounds.

¹ Erie Railroad, 5 cents per barrel on other than sugar.

² New York Central, 7/16 cents per bag or sack.

³ Imported wood pulp, 15 cents per net ton for first 30 days or less; 5 cents per net ton for each succeeding 10 days or fraction, after 15 days' free time allowed. (Domestic added in 1932.)

These tariffs permit removal of the goods stored in transit at any time, in any quantity, and by trucks or other means. If held in storage beyond the above-mentioned time limits, the same rates for storage apply.

² Period extended subsequent to hearing as will appear later.

The tariffs also provide for the following labor charges for loading and unloading freight to and from cars:

Freight in barrels of 400 pounds or less.....	3.5 cents per barrel.
Freight in bags or sacks of 105 pounds or less.....	7/8 cent per bag or sack.
Other freight, in packages or pieces.....	1 cent per 100 pounds.

[fol. 61] Provision is also made for insurance, which is discussed below.

It will be noted that the rates for storage and handling of westbound freight are substantially lower than the rates for storage of eastbound freight. Some of the westbound freight is stored on railroad piers, which are also used for the storage and handling of eastbound freight. The reason for the different storage rates has not been explained by respondents. It cannot be justified by difference in service or service costs.

Insurance

Although respondents' tariff provide that westbound in-transit freight stored by them shall be at owner's risk, except in case of negligence; all of them, except the Central Railroad Company of New Jersey, hold out that they will, as warehousemen, assume liability for actual loss or damage by fire, not to exceed the declared value, at a rate of 8 cents per \$100 of value per annum.

Some respondents protect the liability they assume by obtaining fire insurance from regular insurance companies, and in so doing incur a loss equal to the difference between the 8-cent rate they receive and the higher rate which they pay to the insurance companies. It appears that in some cases the liability is assumed without reinsurance. It also appears that the rates of insurance companies are made in consideration of freight insured being covered to at least 80 per cent of its value.

Total values of freight upon which the insurance liability was assumed, amounts of reinsurance to protect such liabilities, and the extent to which carriers were without reinsurance are not disclosed, nor is it shown whether any claims have been paid by reason of assumption of the insurance liability.

The record indicates that the insurance rate of 8 cents per year per \$100 of value on westbound freight stored in transit at the port of New York was adopted pursuant to an agreement between trunk-line carriers serving that port. The question of equalizing the insurance rates on shipments stored in transit in carrier warehouses on the west side of

the harbor was favorably acted upon at a meeting of the freight-traffic managers, New York Harbor lines, on January 29, 1930, and shortly thereafter the equalized rate became effective. Before that time the carriers' responsibility for freight stored in transit was that of warehouseman only, and the insurance was placed by the owner of the freight at the prevailing underwriter's rates.

Storage sections of the eastbound tariffs of the New York Harbor lines, on the other hand, provide that the carrier shall not be liable for loss or damage to freight stored, except in case of negligence.

[fol. 62]

General Storage Charges

Respondents' so-called general storage charges on carload and less-than-carload freight held or stored in or on railroad premises or tracks, when received for delivery or held to complete shipments, for forwarding directions, or for any other purpose of consignor, consignee, or owner, after the expiration of free time allowed, are as follows: For each of first 5 days, 1.5 cents per 100 pounds, minimum storage charge 25 cents; for the sixth and each succeeding day, 3 cents per 100 pounds, minimum storage charge 50 cents. These charges do not apply on traffic stored in warehouses owned and operated by the carriers exclusively as storage warehouses, on import or export freight at the port when other rules and charges are provided for, on freight subject to lighterage at seaboard points; nor do they apply on automobiles or other self-propelling vehicles (except motorcycles or bicycle motor wheels).

Based on 26 storage days to a month (Sundays and holidays excluded), the charge per 100 pounds of freight at the general storage charges would be 70.5 cents, or \$14.10 per ton for the first month and 78 cents, or \$15.60 per ton, for succeeding months. At New York Harbor points, the charge on eastbound traffic would be 6 cents per 100 pounds, or \$1.20 per ton, for the first month; 9 cents per 100 pounds, or \$1.80 per ton, for the second month; and 12 cents per 100 pounds, or \$2.40 per ton, for the third and succeeding months. On westbound traffic the charge on freight in barrels of 400 pounds would be 1.125 cents per 100 pounds for the first month, and 1.25 cents for each succeeding month. On 100-pound bags or sacks, the charge would be 1 cent per 100 pounds per month.

Ground storage.—Generally respondent carriers will store both domestic and foreign freight, such as iron and steel articles, cooperage stock, rough or sawed stone, and lumber on open piers, bulkheads, or on the ground, at the following rates, the charges including handling except as indicated:

Iron and steel articles, and rough stone: 55 cents per ton net or gross as rated for the first 30 days or fraction thereof computed from the first 7 a. m. after the date on which notice of arrival is sent or given to consignee. Six cents per ton for each succeeding 30 days or fraction thereof.

Sawed stone and cooperage stock: 60 cents per net ton for the first 30 days or fraction thereof and 6 cents per ton each succeeding 30 days or fraction thereof.

Lumber: Unloading from cars \$2.00 per ton of 2,000 pounds; reloading to flat or gondola cars 70 cents per ton of 2,000 pounds; storage for the first 15 days, to be computed from the first 7 a. m. after date of arrival, 63 cents per ton of 2,000 pounds and 6 cents per ton for each succeeding period of 30 days or fraction thereof.

Basis of Computing Rental

The protesting warehousemen contend that in most, if not all, instances where respondents rent warehouse space from a subsidiary company, they pay an exorbitant rental for the space used, and that on the other hand, where respondents lease space to subsidiaries or others, an extremely low rental is received and in some cases the returns are almost negligible. They presented a detailed formula which purports to show the rate per annum necessary to secure a fair return per square foot of warehouse space in the Port of New York district. This formula differentiates between available space and net space which can be occupied by the goods stored. It shows 44 cents per square foot per annum as a necessary rate for available space and 88 cents per square foot net or occupiable space. Both amounts are equivalent to $7\frac{1}{3}$ cents per square foot per month. We are unable to say that these figures are conclusive, but while they were questioned by respondents' counsel as to the methods and calculations used, no attempt was made to disprove by other testimony the results arrived at. A wide variation from the amount determined by the formula to be a proper rental basis is later shown herein. We shall next deal with the practices of the individual respondents.

Baltimore & Ohio Railroad Company

This carrier's facilities devoted to the storage and warehousing of property in the Port of New York district are:

1. Baltimore & Ohio Twenty-sixth Street Stores, a warehouse at Twenty-sixth Street, Eleventh and Twelfth Avenues, Manhattan, which is operated by Baltimore & Ohio Stores, Incorporated, referred to as B. & O. Stores.
2. Second floor of Pier 21, East River, Manhattan, referred to as East River Stores, which is also operated by B. & O. Stores.
3. Space as required, leased from American Dock Company, Tompkinsville, Staten Island, referred to as American Dock Stores.
4. Space as required, leased from Pouch Terminal, Incorporated, Clifton, Staten Island, referred to as Pouch Stores.
5. Piers 5 and 6 and Annexes, St. George, Staten Island.
6. Pier 12, Stapleton, Staten Island, under lease from the city of New York.

Baltimore & Ohio Stores, Incorporated.—In 1913 the B. & O. erected a steel and concrete building, nine stories in height and occupying 22,893 square feet of land, to be used [fol. 64] partly as a freight station and partly for warehouse purposes. In addition to the cost of the building, the land on which the building stands is computed to have cost the carrier \$214,033.49. In addition, other land is occupied by team tracks, and the total cost of the project is shown to have been \$1,640,472.39. Of the latter amount \$812,876.60 is shown as the cost for the land occupied by and for that portion of the building devoted to warehousing. On January 2, 1914, the carrier organized the Baltimore & Ohio Twenty-sixth Street Stores, the name being later changed to Baltimore & Ohio Stores, Incorporated, to operate the warehouse. Title and ownership of the warehouse property rest with the carrier. B. & O. Stores issued 50 shares of capital stock of a par value of \$100 each, 45 shares of which are held in the name of the B. & O. and 1 share is held in the name of each of the five directors as qualifying shares. With the exception of the treasurer and manager of the B. & O. Stores, all officials are also officers of the B. & O.

The B. & O. uses the first floor as a freight station, and a portion of the second floor for office purposes. It leases to

the B. & O. Stores the basement, office space on the second floor, and all floors above the second. It also leases to the B. & O. Stores the second floor of Pier 21, East River, which has a floor space of approximately 50,000 square feet. This pier was leased by the B. & O. from the city of New York at an annual rent¹ of \$49,833.63. The original lease for the Twenty-sixth Street warehouse was entered into March 1, 1914, at which time the annual rental was \$25,000. The rentals have varied from year to year, and a lease effective April 1, 1931, shows an annual rental of \$84,000. This amount apparently included rental of the second floor of Pier 21, East River. The rental actually paid in 1930 was \$96,000 and in 1931, \$87,000. Formerly as much as \$10,000 per year was paid for rental of the second floor of Pier 21, but correspondence of record between the B. & O. and B. & O. Stores indicates that since 1928 no bills have been rendered the B. & O. Stores for this space, as storage operations there did not produce sufficient revenue to take care of the rent.

B. & O. Stores conducts a general warehousing and storage business at both the Twenty-sixth Street warehouse and Pier 21. No in-transit freight is stored for account of the B. & O. However, prior to March 15, 1932, the tariffs of the B. & O. provided for storage in transit of freight, at Pier 21 and B. & O. Stores, except restricted articles, forwarded from points within free-lighterage limits of New York Harbor to rail termini at B. & O. Pier 21, East River Stores, and B. & O. Stores, consigned to points on or via the B. & O. Fifty-Eighth and Woodland Avenue station, West Philadelphia, Pa., west and south thereof, for a period not exceeding 12 months, except on unmanufactured tobacco in carloads, on which the period was 24 months from the [fol. 65] date of shipment from the lighterage-free territory, subject to the freight rates specified in the tariff. The B. & O. by this tariff, therefore, held itself out to store in-transit freight at the B. & O. Stores as well as at Pier 21, although as a matter of fact no freight was so stored. However, the B. & O. does advertise the advantage of using these storage facilities in its published tariff.²

² The Baltimore and Ohio Stores, Inc., Pier 21, East River Stores (Foot of Dover Street). Approximately 50,000 square feet of floor space, located on second floor of pier, under management of The Baltimore and Ohio Stores, Inc.,

The independent warehousemen contend that this tariff informs patrons that if they use the B. & O. Stores they will avoid trucking charges which would be necessary if independent warehouses not having private sidings were used. Advertising of this kind has no proper place in a tariff. It has no relation to transportation for which the carrier exacts a charge and should be canceled from the tariff. In 1921 B. & O. Stores published a schedule of storage rates based on a gross earning of 7.5 cents per square foot per month. These rates were not adhered to, although the storage charges actually collected by B. & O. Stores were con-

New York, N. Y. Storage facilities for inbound or outbound freight without requiring drayage between warehouse and cars. This has the effect of omitting New England Steamship Co. account no service from Pier 21, East River.

The Baltimore and Ohio Stores, Inc. These warehouses connected with The Baltimore & Ohio Railroad Company at 26th Street, New York, N. Y., are 352 feet long, contain ten floors, over four acres of floor space and are of the most modern construction, reinforced concrete throughout. The warehouses are provided with a sprinkler system and receive the lowest insurance rating. They are thoroughly equipped for the storage and handling at reasonable rates, of all nonhazardous merchandise, and their location in the immediate vicinity of the principal Trans-Atlantic Steamship Docks makes them particularly desirable for those engaged in the export and import trade. This location is equally advantageous as a distributing point to all parts of Manhattan Island. There is no cold storage space, but there are cool cellars running the entire length of the building, admirably adapted to the care of goods requiring such storage. Shipments in any quantity intended for storage at these stores should be waybilled to West 26th Street Station (showing care of The Baltimore and Ohio Stores, Inc.) at current New York rates, and the stores will take direct from cars into store without cartage and will make warehouses or city delivery, or re-ship the whole or any portion of a consignment. If re-shipped via The Baltimore & Ohio Railroad no cartage will be necessary, if via other lines, the actual cost of cartage will be added. For further information, apply to Manager, The Baltimore and Ohio Stores, Inc., 11th Avenue and 26th Street, New York, N. Y.

siderably greater than the storage-in-transit rates in effect by the B. & O. at Staten Island.

The income account of B. & O. Stores, including the business of East River Stores, shows that operations for 1930 were conducted at a loss of \$2,778.78, and for the year 1931 the loss was \$7,440.45. These losses were borne by the B. & O.

Accounts of the B. & O. disclose that operation of the B. & O. Stores and East River Stores resulted in a loss to the carrier during 1931 of \$3,678.52, without taking into consideration the annual payment by it for rental of Pier 21.

Separate data for Pier 21, for the year 1931, show total revenue \$14,064.83, total expenses \$5,599.90, and an apparent profit of \$8,464.93. If the rental of \$10,000 formerly paid for this pier were added to expenses, the loss of \$3,678.52, shown by B. & O. accounts, would be increased, and the apparent profit at Pier 21 would be changed to a loss.

With few exceptions, freight taken into storage by B. & O. Stores has been restricted to that on which the carrier would get the line haul. Correspondence of record shows clearly that the warehouse has been operated for the purpose of securing traffic to move via the B. & O., and that its patrons have been those who receive, or propose to ship, freight over the carrier's lines. This is shown by a letter of July 12, 1929, from the president to the manager of B. & O. Stores, in part as follows:

While the earnings at 26th Street have not been so great compared with last year, they held up very well, and the object of operating the warehouses, which is to secure business for the Baltimore and Ohio rails, has been attained.

To the same effect is a letter of January 26, 1929, from the president of B. & O. Stores, to the freight-traffic manager, B. & O. Railroad, and Edwin Morton, manager B. & O. Stores, reading in part, as follows:

I have copies of the correspondence that has passed between you under dates of January 8, 10, 16 and 17, having reference to securing traffic through the medium of the 26th Street Stores. While there is some difference of opinion, as expressed in the correspondence, I am sure there is a desire on the part of both to the end that increased business may be secured for Baltimore and Ohio rails. The railroad

and the warehouse have the same common ownership although operated separately.

This correspondence also indicates that the traffic department of the B. & O. was continually pressing the B. & O. Stores to reduce its storage rates for traffic reasons, and in numerous cases it appears such rates were actually dictated by that department. At East River Stores, goods were apparently taken into storage at what could be obtained for the service; in other words, "the rates not being based on anything but what would get the business."

The correspondence shows also that the manager of the B. & O. Stores on numerous occasions called the attention of officials of the B. & O. to the losses that were being incurred in the operation of storage facilities, and to the performance of services free, or at rates below the cost thereof, upon demands of traffic officials in order to meet the competition of other carriers. This is reflected in a letter of January 10, 1929, from the manager of the B. & O. Stores, in part, as follows:

I expect in time a decision will be rendered that no accessorial service can be rendered by railroads, except at fully compensatory rates. These abuses have grown greater year by year and are of benefit to nobody, except to a very limited [fol. 67] line of shippers, and the losses sustained thereby have to be borne by the balance of the shipping public. The average street man, or traveling freight agent, knows nothing of the costs or responsibilities of performing services, and usually cares less. His only thought is of tonnage, irrespective of whether it is going to yield a profit or a loss. One line puts an abuse into effect, and within a month all its competitors do the same. There is a gradual wiping away of railway net earnings, not alone due to inadequate rates, but to needless losses running into millions monthly that the traffic men initiate and maintain.

As to the new warehouse projects now building or under contemplation on the Jersey side by the Erie, D. L. & W. and Penn., I think we can cross these bridges when we come to them. If we anticipate by reducing our rates to a losing proposition, they will only make theirs that much lower. This applies to the L. V. at Claremont and in the Bronx. All of these buildings were vastly more expensive to build than ours.

The situation was again referred to in a letter of January 11, 1929, from the manager of the B. & O. Stores, as follows:

It is my firm conviction that the net operating revenues of the railroads are eaten into as much by the mistaken seal of the traffic men as a body as they are affected by the whittling down of rates by the I. C. C. They keep establishing more and more bad precedents year after year by giving free services and services at nominal costs or at ruinous rates, which, in the aggregate, run into many millions. Once inaugurated, there is great difficulty in doing away with them. The rival lines, to meet these conditions, are apt to go them one better and still further magnify the losses.

In a letter to its president, dated September 13, 1929, the manager of the B. & O. Stores stated the B. & O. "have been holding hundreds of loaded cars on that side of the water (Staten Island) to await the convenience of consignees, thereby giving them free storage and paying out per diem on foreign cars as much as \$60 a car, and when it approaches this, they adopted the expedient of transferring the contents to a B. & O. car."

In October 1931, it was the opinion of the freight-traffic manager of the B. & O. at New York that since construction of new warehouses by trunk lines serving the port of New York, the supply of such facilities so greatly exceeded the demand that competitive interests were virtually starving for business, with their figures already in the red.

American Dock Stores and Pouch Terminal Stores.—In the summer of 1930 the B. & O. leased portions of the buildings owned by American Dock Stores at Tompkinsville, Staten Island, and Pouch Terminal, Incorporated, at Clifton, Staten Island, in which to store freight owned or held for others under storage-in-transit tariffs. Both leases are flexible as far as space is concerned, and provide for payment on a basis of 55 cents per square foot per year.

Correspondence relating to the leasing and operation of these storage facilities indicates that the leases were made [fol. 68] at the request of the traffic department, and were necessary to maintain the position of the B. & O. among other carriers. This is shown by a letter, dated May 23,

1930, from the general traffic manager of the B. & O. addressed to a vice president of that carrier, as follows:

It is therefore, proposed that space be acquired in American Dock Stores 1 and 2 as freight for storage is tendered, such space to be utilized at our discretion for commodities that require modern stores because of high insurance premiums resulting from the relative value per cwt.

While it is appreciated that storage of freight at American Dock Stores will increase our terminal costs from approximately 3¢ per cwt. to 16¢ per cwt. depending on the period of storage, as compared with our present cost at St. George it is felt that our present predicament warrants such expenditure to maintain our position among the other lines and obtain satisfactory results from a solicitation and traffic producing standpoint.

In May 1930, the freight-traffic manager at New York recommended the leasing of space at American Dock Stores, submitting a statement purporting to show the cost of handling a shipment of 800 tons of rubber stored in transit for a period of one year. He estimated that a storage area of 7,200 square feet would be required, which, at 55 cents per square foot, would cost \$3,960, and, approximating the extra labor at \$1 per ton, or \$800, arrived at a total expense of \$4,760. Total revenue at tariff rates for storage and labor would amount to \$2,160, leaving a net expense of \$2,600 to be borne by the carrier. This would amount to a loss of \$3.25 per ton on rubber stored in transit for one year. The extra labor cost of \$1 per ton is in addition to actual labor performed on consignments of lighterage freight from dock to boat and from boat to car, and the "net expense" of \$2,600 apparently applies only to additional expense which would be involved in storing the shipment at American Docks instead of on piers of the carrier at St. George.

The general manager of the B. & O. New York terminal lines, after making a careful survey on the basis of minimum expense on rubber going into Pouch Stores, and using the example of 800 tons of rubber, computed the "net expense" as \$4.23 per ton. To this he added as minimum costs \$2.46 per ton for labor in and out, \$2 per ton for lightering or trucking, and 20.7 cents per ton for agents and clerk, showing a total terminal and storage expense of \$8,897 per ton, to be absorbed by the carrier before rail

movement began. The rate on rubber from New York to Akron, Ohio, was at that time \$9.40 per ton and the B. & O. proportion, after deducting Central New Jersey and Reading arbitraries, amounted to \$8.36 per ton. The tariff rate on rubber from New York to Akron has since been reduced to \$8 per ton.

As previously stated, correspondence clearly indicates that prior to the initiation of these arrangements, at Pouch [fol. 69] and American Dock Stores, officials of the traffic and operating departments realized that a large loss would be thereby entailed. The estimates of officials of the two departments, while somewhat at variance, indicate that practically the entire revenue from the line haul would be dissipated in terminal operations, due principally to storage and labor incident thereto.

During 1931 the B. & O. used an average of approximately 200,000 square feet at American Dock Stores for storage in transit of westbound freight, which at 55 cents per square foot amounted to \$110,000. The total income received by the B. & O. for the year 1931 from its storage-in-transit operations at this warehouse was \$54,480. The total operating costs were \$146,554 for the year and resulted in a net loss to the carrier of \$92,073, equivalent to an average loss of \$2.48 per ton stored. Items of expense, such as work performed by clerks who also do other railroad work, and any advertising expense, or losses paid as warehouseman, were not included as expense items. Also the net loss shown is subject to slight adjustments, as no deductions were made for the cost of handling into and out of storage, in the case of through shipments, and the fact that cost of extra switching from the warehouse, which is an off-line point, to St. George, was not included. Exact figures to make such adjustments were not available and those presented reflect the approximate results of operations at this point.

Similar data for Pouch Stores for the year 1931, show that B. & O. revenue from freight stored in transit at this facility was \$30,280, operating expenses were \$84,137, and that the total loss was \$53,857, or an average of \$2.26 per ton stored.

Piers 5 and 6, St. George, Staten Island.—Piers 5 and 6, at St. George, are the regular lighterage piers of the

B. & O., and are used for both eastbound and westbound freight, a portion, however, being devoted to the storage of in-transit freight. Due to the intermingling of lighterage and storage operations no data were available showing the investment, operating expenses, or profit or loss to the B. & O. from storage-in-transit operations on these piers for the year 1931. In-transit freight stored at these piers during 1931 amounted to slightly over 8,000 tons, while during the same period about 37,000 and 24,000 tons were stored respectively at American Dock and Pouch Stores.

Pier 12, Stapleton, Staten Island.—The B. & O. occupies a portion of this pier through an arrangement with the city of New York and pays as rent therefor the same amount it collects from shippers for storage under the tariffs, consequently there is no loss from the storage service. The freight stored here during 1931 amounted to approximately [fol. 70] 1,500 tons, the greater part of which was burlap. Total income derived from storage of in-transit freight at this pier for 1931 amounted to \$3,213, and expenses, including rent, labor, and insurance, were \$3,825. The loss of \$611.45 is the difference between the income from insurance and labor, and expenditures on account of these items.

Insurance operations of B. & O.—Prior to September 6, 1930, the B. & O. maintained an insurance rate of \$1.73 per year per \$100 of value to cover westbound in-transit freight stored on Piers 5 and 6, St. George, Staten Island. Some warehouses of competing lines enjoyed more favorable terms, at least one being rated as low as 8 cents per year per \$100 of value. In line with the action of competitive carriers heretofore referred to, the B. & O. adopted the so-called 8-cent rate effective September 6, 1930.

The B. & O. carries insurance with regular insurance companies to protect its liability on the in-transit freight stored at its warehouses on Staten Island. Six policies totaling \$500,000 coverage apply to all commodities stored at any of the Staten Island facilities of the carrier. A uniform rate of 50 cents per year per \$100 of value is charged by the insurance companies and paid by the B. & O. Additional coverage of \$100,000 obtained at rates from 8 cents to about 15 cents per \$100 of value applies to crude rubber to be placed in specified buildings at American Dock and Pouch Terminal.

The total value of freight stored during 1931, upon which the B. & O. assumed the insurance liability published in its tariffs, is not disclosed, nor is it shown that the insurance policies totaling \$600,000, mentioned above, were sufficient to cover such liability. It does appear, however, that during 1931, the B. & O., on the basis of the 8-cent tariff rate, collected \$793.52 from shippers for insurance on in-transit freight stored in its warehouses, and to cover this liability, paid out to insurance companies during the same year \$2,861.07, causing a loss to the carrier of \$2,067.55.

Storage of eastbound freight by B. & O. during 1931.— During 1931, eastbound freight stored by the B. & O. consisted principally of flour, the greatest amount of which was stored at the Continental Milling and Warehouse Company, New Brighton, Staten Island, for the account of W. P. Tanner-Gross Company, flour broker, which also owns the Continental Milling and Warehouse Company. The agreement for storing and handling flour at this warehouse was entered into in 1923, under which the B. & O. was to pay to the warehouse company, for each handling of flour from car to storage and from storage to boat or car, 25 cents per ton, or 50 cents per ton for handling in and out of storage. The B. & O. was also to pay the same rental for [fol. 71] storage space that it collected for storage at tariff rates, leaving the charge of 50 cents per ton for handling in and out of the warehouse as the cost to the carrier. This agreement was canceled effective October 31, 1931, and the amount of loss which the carrier may have suffered thereby does not appear. During the first 10 months of 1931, however, over 14,000,000 pounds of flour were stored by the B. & O. at the Continental Milling and Warehouse Company, for account of the Tanner-Gross Company.

The president of the Continental Company is also president of Tanner-Gross & Company, Incorporated, which is engaged in the merchandising and exporting of flour. He testified that at the present time the Continental warehouse stores no flour for the Tanner-Gross Company, that it is cheaper to allow the various flour-trucking concerns later mentioned to store the flour than to store it in their own affiliated warehouse, and that he knew of no case where storage was now being paid on flour by any flour merchants in New York. He assumed that such trucking companies pay only a nominal rent to the carriers for such space as they occupy for the storage of flour, and that their profits

were made on the trucking of the goods. This latter testimony had reference to the general practices and did not relate particularly to the B. & O. or any other single respondent. This report later shows that the carriers compete for traffic, including flour, and offer low rental rates for storage as an inducement for obtaining such traffic.

Storage in cars.—No record was found of cars being used by the carrier for storage of westbound in-transit freight. However, a considerable amount of eastbound flour was held in cars at St. George and neighboring yards. Statements prepared by the B. & O. show a record of 908 shipments of flour stored in cars during the first 5 months of 1931, at its New York terminals. These shipments were held in foreign cars an average of 8 days per car, then transferred to B. & O. cars, and were held an average of 21 days per car before being delivered and unloaded by the carrier at destination. The total cost of transferring the flour from foreign to system cars, together with expense of final unloading of the 908 cars upon delivery, an obligation of the carrier under its tariffs, amounted to \$52,029.01. No storage charges were collected by the B. & O. for the detention of these cars. The amount of such charges which would have been collected under the eastbound intermediate storage tariff, if flour had been included with other commodities, would have amounted to \$30,401.12. Per diem expense, handling costs, and uncollected storage charges, shown in the statements compiled by the carrier, amounted to \$109,083.13. The total freight charges on these shipments [fol. 72] from points of origin to New York, were \$178,731.20, of which the B. & O. proportion was but \$85,349.77.*

Central Railroad Company of New Jersey

The Central Railroad Company of New Jersey, hereinafter referred to as the Jersey Central, has three piers at Jersey City, namely, Piers 5, 11, and 14, and a warehouse operated by the Newark Warehouse Company, at Newark, N. J., hereinafter referred to as the warehouse company,

* Subsequent to the hearings, or effective September 20, 1932, the tariffs were amended to provide for a storage charge on flour held in cars the same as on general freight held in that manner.

which are devoted to the storage and warehousing of property. It also owns a number of buildings in the Bronx which it rents to various concerns for different business purposes. We shall deal first with the warehouse at Newark.

Newark Warehouse Company.—The Newark Warehouse Company was incorporated under the laws of the State of New Jersey on July 6, 1905, with an authorized capital stock of \$500,000, of which \$10,000 has been issued to the Jersey Central. The principal officers of the warehouse company are also officials of the Jersey Central. The vice president in charge of the traffic department of the Jersey Central is vice president of the warehouse company.

During the years 1906 and 1907 the warehouse company erected a 6-story steel and concrete building with basement, located at Lawrence and Mechanic Streets in Newark, with funds advanced by the Jersey Central, to secure which the warehouse company in 1910 issued a bond for \$1,394,710.95 in favor of the Jersey Central. This bond has been reduced from time to time by the warehouse company, and at the time of the hearing amounted to \$1,100,000. The building is 360 feet long and 175 feet wide, with a total commercial warehouse space of about 250,000 square feet. The south side of the building on the first floor is served by sidetracks of the Jersey Central. The building in addition to providing warehouse facilities contains a local freight station of the Jersey Central, occupying about 35,000 square feet on the first floor and 30,000 square feet on the second floor. Portions of the first and second floors are also used by the warehouse company for delivery and distribution of freight and for offices. The four top floors are used exclusively by the warehouse company, except approximately 400 square feet on the third floor.

For the past few years the Jersey Central has paid an annual rental of \$87,324.36, equivalent to 6.57 per cent of the entire investment in the property, to the warehouse company for the space occupied by it. The rental has varied [fol. 73] from time to time but has been gradually increased over a period of years to the present basis. It appears to have been based in part on the difference between total receipts and total expenditures, and thus includes any deficit incurred by the warehouse company. Although the Jersey Central uses only 20.63 per cent of the warehouse space,

the rent paid for the year 1931 amounted to 74.43 per cent of the gross revenue of the warehouse company of \$117,309.51. During the same period the warehouse company suffered a deficit of \$52,325.76. The deficit incurred would have been still greater if the rental paid for space used as a freight station had been more nearly commensurate with the space occupied. It is thus clear that by the rental arrangement the carrier assumes the burden resulting from any unprofitable operation of the warehouse. This is clearly shown in a statement by the real estate and tax agent of the Jersey Central to the comptroller, reading as follows:

It would seem to me that a fair adjustment as between the Warehouse Company and the Railroad Company would be for the Railroad Company to pay as rental whatever sum there may be as between the earnings of the Warehouse Company and the expenses on account of interest, taxes and maintenance of the property. Thus as time goes on and the Warehouse becomes more profitable and earns more revenue, the rental to the Railroad Company will be correspondingly annually reduced.

The warehouse company engages in a general commercial storage and warehouse business. No in-transit freight is stored in this warehouse for the account of the Jersey Central, although its published tariffs provide that in-transit freight will be stored there. A small amount of space is rented by the warehouse company to various concerns on a square-foot basis, and a number of other accounts are handled on a basis of rates per 100 pounds for storage and handling. The rates for space on the square-foot basis range from 5.5 to 6.5 cents per square foot per month or from 66 to 78 cents per square foot per year.

The Newark warehouse was constructed and financed by the Jersey Central as a medium through which traffic would be attracted to its line. Traffic solicitation and advertising for the warehouse company emanate from the freight-traffic department of the Jersey Central in connection with the railroad's traffic information. In June 1931 it was estimated that this building was filled to only 10 per cent of its capacity.

Piers 5, 11, and 14—Jersey Central Piers 11 and 14, located in Jersey City, are adjoining single-deck covered piers of steel and concrete construction with railroad tracks

running through their center and are used for lighterage freight. Pier 5 is an old pier and is used for storage of waste paper and soap. The ledger value of these facilities [fol. 74] on December 31, 1931, was \$707,337.03. The total cost of reproduction new, less depreciation, based on our primary valuation as of June 30, 1918, including additions and betterments subsequent to June 30, 1918, was \$673,267.54. The total maintenance cost, including taxes and insurance for the year ended December 31, 1931, was \$45,859.33.

The total revenue from storage and handling charges on westbound in-transit freight stored on these piers for the year ended November 30, 1931, was \$21,504.55. Of this amount \$16,584.08 was for storage, \$3,514.81 for handling, and \$1,405.66 for extra handling. The Jersey Central has extensive ground storage space on the water front of Jersey City devoted to the storage of heavy commodities, principally structural steel. The total revenue derived from ground storage and handling on westbound in-transit freight during the same period was \$434.58. Cars were also used to a large extent for the storage of westbound in-transit freight, the principal commodities being rags and waste paper. Prior to 1929, large quantities of rags and waste paper were stored on the piers, which because of fire hazard were subsequently ordered removed and then stored in idle equipment in the yards. The total revenue derived from storage and handling of these commodities during the year ended November 30, 1931, was \$6,678.59.

The total revenue for the year ended November 30, 1931, derived from storage charges on eastbound freight was \$51,378.53. Of this amount \$50,470.36 was for ground storage.

The average handling cost at these piers, whether from car to dock or from dock to car, is 42.8 cents per ton and for necessary double handling 85.6 cents per ton. The tariff rate as previously shown is 20 cents per ton for each handling.

In 1928 the vice president of the Jersey Central proposed to the other trunk-line carriers that the published labor charges for handling in-transit freight be increased to 50 cents per ton. The proposal was not adopted. Manifestly the carrier must bear the deficit in this operation.

The Jersey Central, contrary to the practice of the other trunk-line carriers, does not publish an insurance rate of

8 cents per \$100 of value on freight stored in transit at railroad terminals. At Piers 11 and 14 its insurance rate is \$1.29 per \$100 of value, and it has refused to lower this rate to conform with the charge made by other trunk lines. The high rate is caused partly by the inaccessibility of these piers from the land side for fire-fighting apparatus.

[fol. 75]

Lehigh Valley

The Lehigh Valley has a large warehouse in the Borough of the Bronx, New York City, known as the Lehigh Valley Bronx Terminal Warehouse, herein referred to as the Bronx warehouse; a freight shed at Claremont Terminal, together with Piers B, C, D, G, and I, in Jersey City, and Pier 44, East River, New York, all of which are devoted to storage and warehousing. The Pioneer Real Estate Company, a wholly owned subsidiary of that carrier, also owns a plot of land in Manhattan which is leased to the Starrett Investing Corporation which, in turn, subleased it to the Starrett Lehigh Building, Incorporated, which constructed a large warehouse on the ground. The Bronx warehouse will be considered first.

Bronx warehouse.—The Bronx warehouse is a 12-story modern building of fireproof construction located a short distance from the Bronx Terminal of the Lehigh Valley on the Harlem River. It was constructed at a total cost of \$1,419,631.83 and was opened for operation on May 15, 1929, and is owned by the Pioneer Real Estate Company. Of this amount \$128,779.97 was for land and \$1,290,851.86 was for the warehouse. All of the stock of the Pioneer Real Estate Company is held by the Lehigh Valley, and the directors and officers of the real-estate company are also officers and directors of the railroad. The Lehigh Valley is thus the sole owner and operator of this warehouse.

The Lehigh Valley does not directly perform storage or distribution service in this warehouse, but rentals are made through its land and tax agent, who leases entire floors, or parts thereof, to tenants for offices, light manufacturing, storage, and warehousing purposes.⁶ The rentals are

⁶ Effective April 10, 1932, the tariff was amended to provide that "At Bronx Terminal, East 149th St., N. Y., automobiles, passenger, C.L., on their own wheels, in carloads, not delivered within the 48 hours free time will be stored in

usually made on a square-foot basis, either on long-term or short-term leases. Although the building has been in operation since May 15, 1929, a very large portion has never been occupied.

Only one of the tenants, the Lehigh Harlem River Terminal and Warehouse Company, herein referred to as the Harlem Company, conducts a public warehouse business, which is confined to the storage and distribution of automobiles. The Harlem Company rented the eighth floor for a term of one year, beginning on November 1, 1929, at a monthly rental of \$800 for the first quarter, \$900 for the second quarter, \$1,000 for the third quarter, and \$1,100 for the [fol. 76] fourth quarter, amounting to an annual rental of \$11,400. In July 1930, the Harlem Company sought a reduction in its rent to \$500 per month, on a per month basis, on the ground that its business had been unprofitable. The general land and tax agent of the Lehigh Valley in a letter, dated July 24, 1930, to the vice president and general counsel, advised as follows:

• • • we should revamp the lease, effective June 1, 1930, and rent him the space at \$500 per month. He is willing to accept a monthly tenancy and for the same reasons we granted the original lease it would seem advisable for us to enter into a new contract rather than to have him vacate.

Several inspections of the storage conditions at the Bronx warehouse, made by our representative, disclosed that on June 29, 1931, the Harlem Company occupied space on the tenth, eleventh, and twelfth floors in the warehouse for the storage of automobiles for which it did not pay rent. Inspection made on January 22, 1932, disclosed that the second, fourth, and fifth floors were only approximately one half occupied and the tenth, eleventh, and twelfth floors were entirely empty. At this time the sixth floor was found to contain 86 automobiles for account of the Harlem Company and on a third inspection, February 25, 1932, it was found to contain 186 automobiles, for which periods no rental

our warehouse at the following rates of storage and while so held, this Company shall not be liable for loss or damage, except in case of negligence of this Company." The rates provided are those applicable on eastbound in-transit freight.

was being paid for the space occupied. A lease for use of the sixth floor was subsequently entered into with this concern and made retroactive to January 28, 1932, providing for a monthly rental of \$500 for the entire floor, with the proviso that "Inasmuch as only 50 per cent of the space was to be used at that time, rental is to be at rate of \$250 per month until the use exceeds 50 per cent of the area at which time the rental shall automatically become \$500 per month."

There appears to be no uniformity in the amounts charged to various tenants for similar space, which may be explained, in part at least, by the necessity of finding tenants to occupy some of the space and produce some revenue rather than let the whole building remain vacant. The minimum rental, per floor, in the Bronx warehouse varies from \$14,000 to \$20,000 per annum, except for the space occupied by the Harlem Company. This concern pays considerably less than the minimum rental both for space it occupies permanently for merchandise storage and for the so-called temporary space used for the storage of automobiles.

For the year 1931 the rental received from the building yielded a return of slightly over 2.5 per cent on the investment. This makes no allowance for depreciation of 2 per cent, which is the figure used by the carrier in determining its return.

The evidence shows that the Lehigh Valley directs its efforts to leasing space in the Bronx warehouse to tenants [fol. 77] who will produce freight traffic to the carrier's lines. Numerous prospective tenants were refused space because the rail traffic their business would produce was not considered sufficient to warrant allotting them space. In a letter from the vice president of the Lehigh Valley to the general land and tax agent, with reference to leasing space in the Bronx warehouse to the Bates Chevrolet Company, he said:

There would no doubt be some advantage from a real estate standpoint in making this lease, but at the same time we desire to keep the space in the warehouse available for prospective tenants who will be of some value to us from a traffic standpoint as well, and for the time being we do not desire to conclude any leases in this property from a purely real estate standpoint.

Starrett Lehigh Building.—On June 23, 1930, the Pioneer Real Estate Company leased certain lands located in Manhattan to the Starrett Investing Corporation for a term of 99 years, at an annual rental of \$120,000 for each of the first 21 years, and for each subsequent period of 21 years the rental was to be determined on the basis of 6 per cent of the value of the land as determined by a current appraisal. The lessee undertook to construct a building on the leased lands to cost not less than \$6,000,000, and not more than \$9,000,000 and to contain not less than 24,000,000 cubic feet of space. The Lehigh Valley agreed to lease the entire street or ground floor of the building at a rental of \$50,000 per annum for the first 21 years. During subsequent periods this rental is to be increased or decreased accordingly as the rental paid by the Starrett Investing Corporation to the Pioneer Real Estate Company is increased or decreased under current appraisal. The lease is to run for a period of 99 years. The cost of the leased land was \$1,806,953.13, and the carrier expended approximately \$200,000 in making track changes and installing the necessary facilities on the ground level of this building. The Pioneer Real Estate Company guaranteed a mortgage of \$4,500,000 on the land and building, which was given by the Starrett Lehigh Building, Incorporated, the assignee of the lease from the Starrett Investing Corporation, to the Title Guaranty and Trust Company of New York City.

On June 22, 1932, a few days prior to the hearings, the Pioneer Real Estate Company was forced to take over this property by assuming the mortgage of \$4,500,000. The result is that the Lehigh Valley has this large enterprise on its hands, in addition to the unprofitable Bronx warehouse venture.

While it was not determined that the Lehigh Valley took any active part in the operation of this building, the lease provides, among other things, that the lessor should build the first floor so as to make it suitable for the operation of trains and also should construct cranes and a subgrade suitable for the construction of tracks thereon, and the carrier agreed to provide tracks and other facilities for station operations.

National Storage Company.—The National Storage Company was incorporated under the laws of the State of New

Jersey on April 11, 1867. In 1902 the Lehigh Valley acquired with the exception of directors' qualifying shares, all of its capital stock for which it paid \$6,000,000. Officials of the carrier are the principal officers of the storage company. The storage company conducts a commercial merchandise warehouse business in Jersey City, and for that purpose uses a warehouse consisting of several units, some of two stories and others of six stories, of brick construction. The warehouse is served by sidetracks of the Lehigh Valley. The approximate size of the warehouse is 200 feet by 150 feet, containing about 120,000 square feet of floor space.

The property of the storage company consists of approximately 111 acres of land upon which has been constructed, besides this warehouse, railroad tracks, piers, docks, elevators, and several small structures. These structures were almost totally destroyed by the well-known Black Tom explosion in 1916. For some time thereafter nothing was done with the property, but in 1921 the storage company leased the greater part of it to the Lehigh Valley, retaining for itself a portion of the land, approximately 180,000 square feet, together with certain structures thereon, and wharfage rights to about 175 feet of bulkhead between Piers 4 and 5. In July 1931 the storage company was using Pier 4 instead of Pier 5, as reserved in the lease. Pier 4 has an area approximately three and one half times that of Pier 6. However, taxes were being paid by the storage company on the basis of the smaller pier. When this situation was called to the attention of the Lehigh Valley by our representative, assurance was given that an adjustment would be made based on the property occupied. Under the lease the carrier agreed to pay the entire cost of maintaining and operating the property and to pay all taxes, except franchise taxes on the business of the storage company.

The evidence shows that approximately \$1,000,000 was advanced to the storage company by the Lehigh Valley shortly after the Black Tom explosion to defray the cost of a partial reconstruction of the property. In November 1930 total advances as shown on the books of the carrier amounted to \$1,094,638.01 which amount was transferred to cost of the stock and increased the carrier's investment in the storage company by that amount. During the year 1931 it appears that the carrier advanced a further sum to the storage company of \$35,245.16. The books of the Lehigh Valley show the total investment in the storage company as

[fol. 79] of December 31, 1931, as \$4,141,761.86. The net income to the storage company for the year ended December 31, 1931, was \$33,310.82. However, no account is made of interest on investment. Our representative was unable to separate the investment in the property by the storage company from the investment in the property by the carrier.

The only commodity stored by the storage company is sugar. Under an arrangement with one broker all of the sugar-storage space is contracted for at the rate of 30 cents per ton per month. When the sugar is sold by the broker and the ownership is transferred from bulk to lot, the new owners are charged 75 cents per ton per month.

Claremont and Jersey City piers.—The carrier devotes a large part of its storage and warehousing activities at Claremont Terminal which adjoins the water, and its five piers, at Jersey City, namely Piers B, C, D, G, and I, to the storage of both eastbound and westbound in-transit freight. These facilities are used jointly for storage and lighterage operations. The investment in these various properties by the carrier is not available, and from the records it was impossible to separate the investment devoted to lighterage from that chargeable to storage. Neither was it possible to ascertain the cost of handling storage freight and ordinary lighterage freight, as the costs are not segregated in the carrier's records.

The total revenue from handling and storing 84,970,000 pounds of westbound in-transit freight during the year 1931 was \$52,047.94. For the same period revenue of \$15,101.34 accrued from storage on 43,678,000 pounds of eastbound freight. On 135,056,000 pounds of structural steel stored on the ground at National Docks, Jersey City, \$49,161.97 was collected.

The carrier pays 43.3 cents per net ton for handling westbound freight and 30.2 cents per net ton for eastbound freight. As previously shown, the published handling charge is 20 cents per ton on westbound freight, while on eastbound freight the storage rate includes handling.

A very considerable portion of the westbound tonnage stored at the Claremont Terminal was stored on lighters or barges. On December 31, 1931, 53 barges out of a total of 97 owned by the Lehigh Valley were tied up at Claremont loaded with storage in-transit freight, principally rubber. During the period that these lighters were tied up with

storage freight, several outside lighterage companies were employed to handle the regular eastbound and westbound business. The amount paid for outside lighters in 1931 was \$407,156.17, which includes allowance made under the tariff to shippers and consignees which perform their own lighterage service. It appears that no westbound freight was stored in cars. However, eastbound flour was frequently held in cars at Jersey City for considerable periods. During the year 1931, 37 cars were held for various periods, ranging from 4 days to 48 days. No storage or demurrage charges were collected for the detention of these cars.

The carrier argues on exceptions that this flour was consigned to a tenant of leased space on one of its piers; that it was obligated under the tariff to unload the flour to this leased space, and to reload it into cars when forwarded for final delivery in New York Harbor, that by holding the flour in cars it was relieved of the handling expense of \$13.60 per car of 20 tons, resulting in a net saving of \$364.20 on these cars, after deducting per diem on the foreign cars used; that it was more economical to hold the shipments in the cars than to unload them, and that the practice was free from any preference or prejudice to any shipper.

The Lehigh Valley leases space on these piers to shippers for storage or warehouse purposes at a uniform rate of 24 cents per square foot. It publishes in its tariff the 8 cents, per \$100 of value, insurance rate on westbound freight stored in transit on these piers, but does not reinsure with any insurance company, and takes care of its liability out of its own treasury.

The Lehigh Valley occupies Pier 44, East River, under lease from the city of New York at an annual rental of \$14,858.25. This is a 2-story pier, and is used almost exclusively for the storage and distribution of flour. The lower floor is used by the carrier to store freight during the free-time period and the upper floor is rented to three flour-distributing concerns at a rate of 36 cents per square foot per annum, except a small area which is rented to a fourth lessee at a slightly higher rent. The carrier pays the Postman Flour Trucking Company 55 cents per ton for handling flour from car to storage, and 60 cents per ton on other freight, of which there is but little. This payment is made because of the railroad's tariff obligation to unload

eastbound carload freight at its New York Harbor pier stations.

The Lehigh Valley employs William Spencer and Son to perform all stevedoring at its Jersey City piers at a rate of 32 cents per ton. Prior to February 3, 1932, the rate was 34 cents per ton. The 32-cent rate is 42 per cent less than the 55-cent rate paid to the Postman Company for stevedoring on Pier 44, the latter company controlling considerable traffic.

Pennsylvania Railroad

The principal facilities devoted to the storage and warehousing by the Pennsylvania in the New York district, are located at Greenville and Harsimous Cove, N. J. The Pennsylvania is also interested to a large extent in the Pennsylvania Dock and Warehouse Company at Jersey City.

[fol. 81] Greenville Pier.—The Greenville Pier is a covered single-deck pier, 210 feet wide and 1,002 feet long; total area 210,420 square feet. During 1931 this pier was used both for storage in transit and for handling east and westbound lightering freight. About January 1, 1932, lightering operations were discontinued, and the pier was thereafter used exclusively for storage of in-transit freight. The total value of the Greenville land and pier as of June 30, 1918, was \$823,761.71.* The total cost of overhead for the year 1931, including taxes, insurance, and maintenance, was \$20,737.25.

On February 29, 1932, this pier was filled to one half the storage capacity. The total earnings from storage charges on eastbound freight for the calendar year 1931, were \$5,523.71, and for storage and labor charges on westbound in-transit freight were \$8,862.91. The earnings for ground storage of structural steel, adjacent to this pier, for the same period were \$58,434.54.

Piers K and L.—The two piers at Jersey City (Manhattan piers) have two floors, and are used for handling lightering freight as well as for storage of eastbound and westbound transit freight. The total investment in Pier K,

* Amounts shown are as computed by our Bureau of Valuation.

as of June 30, 1918, was \$1,698,980.39,* and the total maintenance, including taxes and insurance during the year 1931 was \$41,600.88. The total investment in Pier L, as of the same date was \$1,282,438.99,* and the total maintenance, including taxes and insurance, for 1931 was \$38,449.78.

The total storage charges earned on eastbound freight at these piers for the year ended December 31, 1931, were \$8,756.51 and on westbound transit freight, including labor charges were \$33,804.30. We were unable to separate or apportion the investment or overhead expenses, on these piers, due to the intermingling of lighterage and storage freight in the same location.

Handling.—All handling of freight stored in transit at the Greenville and Manhattan Piers is done by contract labor. The rate paid for this work prior to August 10, 1931, was 44.45 cents per ton for each handling. On August 10, 1931, this rate was reduced to 41.75 cents, and on March 1, 1932, a further reduction was made to 40 cents.

Leasing.—One of the principal commodities stored on Pier K is flour. The Pennsylvania leases to the International Milling Company 5,000 square feet of the in-shore end of the second floor of this pier, for the storage of flour, both export and domestic, at an annual rental of \$1,200, averaging 24 cents per square foot. The record shows that the Pennsylvania was unable to secure any considerable portion of the domestic flour traffic because it would not meet the competition of other trunk lines in making allowances to lessees and contractors for unloading flour at their [fol. 82] pier terminals. Its tariff provided for the handling of property to or from the leased space by employees of the Pennsylvania, any additional labor to be performed by and at the expense of the owner of the property. Its position is shown in correspondence between officials as follows:

I do not understand how we can meet this situation, for the reason that we do not have sufficient space at any of our pier stations, which could be leased to a number of these truckmen. Then, too, I do not think that satisfactory arrangement could be made to permit the unloading from

* Amounts shown are as computed by our Bureau of Valuation.

our carfloats by the truckmen. This practice of making an allowance to the consignee for unloading is very irregular and steps should be taken to get these trunk lines to discontinue it at once. v

While certain of the trunk lines had similar tariff provisions they apparently permitted the lessee or truckmen to do the unloading and paid an allowance therefor.

The rates paid for handling flour for the railroads in the New York district varied from 50 to 60 cents per ton. This is much higher than the usual stevedoring rate paid to contractors who handle all types of merchandise. The rates paid to contractors for general handling seldom exceed 40 cents and in a few instances are as low as 35 cents per ton. The New York Central leases space in its warehouse at Port Morris or on its piers, and allows the lessee 60 cents per ton for unloading. The Lehigh Valley leases space on its Pier 44, and has a contract for unloading all flour at that pier for 50 cents a ton.

A large part of the traffic stored on Pier L is soap and soap products manufactured by the Colgate, Palmolive Peet Company at Jersey City, only a short distance from Pier L. The handling of a particular car, containing several kinds of soap products from the nearby Colgate plant, was observed by our representative while being unloaded at Pier L. All of the contents of this car was not unloaded and placed in storage, a portion thereof together with other goods taken from storage on this pier being reshipped in the same car the same day. Storage charges were assessed for the initial period on the tonnage not removed from the car, and the customary handling charge in and out of storage was also collected. Records of the carrier revealed that many other shipments from the Colgate Company were handled in like manner. Many of these shipments were consigned to various points in trunk-line and C. F. A. territories, but many of them were also consigned to New England points, particularly Boston, Mass. The shipping instructions given by the shipper show the numerous different products in the car, and also the different products that were handled into storage. To comply with these instructions it was necessary for the carrier to assemble a carload lot from many different piles stored on the

pier and collect it by trade mark, brand number, or other designation. No additional charge was made for this service by the Pennsylvania.

[fol. 83] Less-than-carload shipments of soap products, when shipped out of storage by Colgate to New England points, were handled by the Pennsylvania to Trenton, N. J., where the Boston cars were made up. The shipments were then handled back over the same rails to the Pennsylvania terminals in Jersey City and then floated across to the New Haven connection, and then moved to Boston without extra charge for the back haul.

Insurance.—The Pennsylvania found on numerous occasions that, because of its high insurance rate on shipments of import traffic, it was unable to compete for westbound storage-in-transit freight. The attitude of the traffic officials of the Pennsylvania toward attracting traffic through a lower insurance rate is stated in a letter from the general eastern freight agent to the assistant general freight agent, as follows:

Several of the New York lines have in operation or under construction, especially the Erie, D. L. & W., and ourselves, up-to-date waterfront facilities for storage of transit freight. The insurance rates at these more modern facilities are much lower than can be obtained at the L. V. terminals, more particularly their piers at National Docks and Jersey City property is not so modern and fire hazard greater.

One of the principal reasons the carriers are erecting these expensive modern facilities is to attract business, and to us it is very apparent the L. V., to meet this new competition have figured a uniform insurance rate would somewhat nullify the advantages accruing to those lines with more modern facilities and lower rates.

We doubt the legality of such an arrangement and strongly recommend a uniform insurance rate be opposed.

It later reluctantly became a party to the 8-cent rate in order to meet competition.

The standard insurance rate based on \$100 value at Greenville piers is \$1.68; at Pier L, \$1.58; at Pier K, 27.7

cents, and Pier C, Jersey City, \$1.905. The Pennsylvania in order to meet this low 8-cent insurance rate found it necessary either to absorb the difference between the 8-cent rate and the higher or standard rates or assume the liability. The following table shows the amount that would be absorbed on a typical carload of rubber moving from New York to Akron, based on a carload of 40,000 pounds, value of 17 cents per pound, or a total of \$6,800 per car:

	Insurance rate	Equalized rate	P. R. R. absorbs	P. R. R. absorbs per car
Pier C.....	\$1.905	\$0.08	\$1.825	\$124.10
Pier K.....	.277	.08	.197	13.39
Pier L.....	1.580	.08	1.50	92.00
Greenville pier.....	1.680	.08	1.60	108.80

[fol. 84] In a letter from the freight-traffic manager to the general traffic manager, freight, the following statement appears, among others:

Based on Mr. Ball's view and that the Pennsylvania Dock and Warehouse Company would not be a railroad operation, I was favorable to the equalization situation for the reason that when the large accumulation of goods in waterfront warehouses at New York is ordered out after the new tariff is enacted, there will be very keen competition, as I see it, for this westbound storage in transit traffic, and from my past experience we were at a serious disadvantage, particularly on the rubber business.

The record is that the matter will be recommended to the Executives, each member to report to his own executive the approximate cost of such equalization, that is, the amount to be absorbed over that paid by the owner as insurance, i. e., 8 cents per \$100 per annum. In discussing the matter with Mr. Peters of the insurance department it was his opinion that we can carry this insurance, I believe, in our own fund at a cost of approximately 15¢ per hundred per annum, so that the amount of absorption on our part will not, as I see it, be a very serious dissipation of our revenues.

During the year 1931, the Pennsylvania collected a total of \$529.25 insurance on freight stored in transit. The carrier assumes the liability.

Pennsylvania Dock & Warehouse Company.—The Pennsylvania Dock & Warehouse Company, hereinafter termed the warehouse company, was incorporated under the laws of the State of New Jersey on February 4, 1929. On August 20, 1929, the Pennsylvania leased to the warehouse company a parcel of land in Jersey City containing 377,400 square feet. The Pennsylvania joined with the warehouse company in the construction of the leased land of a modern warehouse and cold-storage plant, consisting of three units. Unit no. 1 was to be devoted to cold storage and units nos. 2 and 3 to a general warehousing business. The Pennsylvania advanced large sums of money toward the construction of the project, and went to considerable expense in clearing ground and replacing track and float bridges located on the property to be used as a site for the proposed warehouse. Consideration had been given to such a project for the past 20 years, but the movement had not gained momentum until the prosperous era of 1924 and 1925.

The warehouse is of reinforced-concrete construction, equipped to render complete service, including cold storage, pool-car distribution, bonded warehousing, warehousing on a package basis, and general warehousing. The complete unit extends 970 feet on the water front and is 320 feet in depth. It is served with seven Pennsylvania sidings, three tracks entering unit no. 1 and two tracks entering unit no. 2 and unit no. 3. The main trucking entrance is a concrete drive 60 feet wide. Shipments can be handled direct from lighters and steamers.

[fol. 85] The lease runs for 21 years, at an annual rental of \$50,000 for the first 11 years, with a subsequent rental to be fixed at 5 per cent of the value of the land as determined at the end of 11 years. Common use of considerable of the property was provided for. The lessee has the option of renewing the lease for two additional terms of 21 years each. The lessee is to pay all taxes, assessments, and duties. The lessee was to construct a warehouse and cold-storage building at an approximately cost of \$6,756,000 and \$1,780,000 respectively. The Pennsylvania controlled every important detail in the construction of the warehouse. The lease provides in part:

The said warehouse buildings . . . shall be constructed of material and in accordance with plans and specifications to be approved by the parties hereto,

* * * and the lessee shall deliver to the lessor within six (6) months after the completion of the said structures a complete statement in such form and detail as the lessor shall require, verified by affidavit of the President of the lessee of the amount expended by lessee in the construction thereof.

The lessor required the lessee to furnish a bond, in the amount of \$7,000,000, providing for construction and completion of the facilities to the satisfaction of the lessor and at the times provided in the agreement. Failure of the lessee in any of these respects forfeited the bond to the lessor, and conferred upon the lessor the right to complete construction of the facilities. The lessor not only controlled every detail of construction, but dictated the rights of the lessee to place mortgages on the premises, and provided that the lease should not be assigned without prior consent of the lessor. The privilege of subletting any portion of the warehouse buildings was also covered by the agreement.

The lease further provided that the lessee will give preference to traffic passing over the lessor's railroad lines and that the warehouse building will not be used for any purpose inimical to the lessor, and that if the proper relationships between lessee and lessor cannot be brought about, the lessor may recapture the entire property under certain terms and conditions. The Pennsylvania secured an interest in the warehouse company through the purchase for cash of junior bonds of the warehouse company, aggregating \$1,500,000, which were subordinate to the first-mortgage bonds of \$5,750,000. As security for further advances to the warehouse company, the Pennsylvania obtained additional junior bonds of the warehouse company amounting to \$1,300,000. To complete the construction of the building the Pennsylvania advanced an additional \$1,316,000. The Pennsylvania, therefore, contributed \$4,116,000 directly to this warehouse project, which is constructed on its lands valued at \$1,132,200,^{*} the two total-

^{*} Amount shown computed by our Bureau of Valuation. [fol. 86] ing \$5,248,200. No rent for the land and interest on the \$4,116,000 had been paid. The warehouse company has been in receivership since July 1931.

Other expenditures by the Pennsylvania in furtherance of the construction of this warehousing project were for the new piers. Pier D cost the carrier \$1,645,000, and Pier F \$1,825,000. Total investment in connection with piers and warehousing facilities was \$9,000,000, a large part of which was the expense of removing old facilities to clear the site.

General Cold Storage Company.—The General Cold Storage Company was incorporated under the laws of New Jersey on July 31, 1929. It has operated unit no. 1 of the Pennsylvania Dock & Warehouse Company as a cold-storage plant since September 14, 1930. Differences arose as to what rent it was to pay, and up to July 16, 1931, it paid \$28,000. No rental has since been paid, and no formal agreement as to the rental has been executed, although the monthly rental was understood to be \$24,791.42. Although no rent was paid for the use of these facilities, the General Cold Storage Company's income statement for the year ended December 31, 1931, showed a deficit of \$2,247.35.

The traffic officials of the Pennsylvania took an active part in the selection of an operator for the cold-storage facilities in connection with this warehouse project.

It appears clear that the interest of the Pennsylvania in the warehousing and storage facilities was to meet the storage rates of its competitors. Although the Pennsylvania denied it has taken any part in the operation of the warehouse company, and claims it is not in the cold-storage business, the evidence shows a very close relationship between the operating companies and that carrier.

Delaware, Lackawanna & Western Railroad Company

The Delaware, Lackawanna & Western, herein called the Lackawanna, has four piers in Hoboken, N. J., devoted to storage and warehousing, namely Piers 3, 4, 7, and 9; and also a large warehouse in Jersey City, known as the Lackawanna Terminal Warehouse, Incorporated. The latter is referred to herein as the warehouse company, and will be considered first.

Lackawanna Terminal Warehouse Company.—The warehouse company was incorporated under the laws of the State of New Jersey on July 10, 1929. All of the capital stock is owned by the Lackawanna, which company also furnished the working capital. Certain officers of the carrier hold like positions with the warehouse company, and certain other

officers who were formerly employed by the carrier now con-[fol. 87] stitute the management of the warehouse company. In April 1930 the Lackawanna completed construction of and had ready for occupancy as a warehouse an 8-story-and-basement concrete-and-brick building, consisting of seven units located approximately one half mile back of the water front. The building is 848 feet long by 163 feet wide, with a total floor space of 1,072,883 square feet. By a rather elaborate arrangement of fills and viaducts the unloading tracks on both sides of the building are brought to the second-floor level in order to facilitate the loading and unloading of cars. Loading facilities for motor trucks are under cover on the street level. Sidetracks connecting with the Lackawanna, on the second-floor level, accommodate 52 cars at one time. The first floor is on the track level and has four tracks with a working capacity of 70 cars to serve the freight house.

The freight station of the Lackawanna occupies space on the first and second floors, equal to 12.92 per cent of the gross area of the building, and the first floor provides space for facilities for trucks to receive and deliver less-than-carload shipments. There is bonded space and a United States storekeeper also on the premises.

The portion of the building to be used as a warehouse is leased to the warehouse company. The lease provides, in part, that:

The amount of space to be occupied by the Lessee will vary from day to day and the Lessee agrees to pay as rent for the average amount of space occupied such proportionate part of Twenty Thousand Dollars (\$20,000.00) a month as the average amount of space occupied bears to said space of 1,072,883 square feet. Said rent shall be payable monthly at the end of each month during the continuance of this lease.

The monthly basis of \$20,000 was arrived at by computing interest at 5 percent on an amount of approximately \$5,000,000 which the Lackawanna considers its investment in warehouse facilities.

The warehouse and freight-terminal facilities were constructed by the Lackawanna at a cost of \$9,199,062.09 with funds secured in part from the proceeds of a bond issue of \$15,000,000 made by the Morris & Essex Railroad Company, a leased line, under authority of the Commission. Bonds of Morris & E. R. Co., 154 I. C. C. 105. These bonds

were surrendered to the carrier, it having guaranteed them, and \$1,533,219.57 secured from the sale of these bonds was devoted by the carrier to the construction of these facilities. Additional funds were supplied from temporary bank loans or surplus cash funds of the carrier. The total cost includes the cost of land which had been purchased by the carrier from time to time in the years preceding this construction. In addition to owning the capital stock of the warehouse company, the Lackawanna made advances from time to time which up to December 31, 1931, aggregated \$71,877.71. Of [fol. 88] this amount approximately \$9,000 was repaid in the adjustment of salaries of joint employees paid by the warehouse company for work which was chargeable to the railroad. Of the amount advanced, \$62,942.66 was outstanding on December 31, 1931. There is no record of interest having been paid by the warehouse company to the carrier for the use of this money.

The warehouse company conducts a general commercial storage warehouse and distribution business. A considerable portion of the warehouse is subleased for storage, light manufacturing, warehousing, distribution, and office space, on a square-foot basis. Approximately 25 per cent of the entire space leased by the warehouse company was subleased on November 30, 1931. The remainder of the space was used for general storage, usually on a per package or per 100-pound basis. Rentals range from 50 cents to 65 cents per square foot, an average of 55 cents. The warehouse company pays the carrier 22.368 cents per square foot. This figure is not comparable with the 55-cent rate for subleased space in that it is gross area and takes into account all space necessary for aisles, columns, etc.

The carrier specified what portions of the building were to be used as a warehouse and as a freight station. This separation was made on the basis of area occupied, namely, 87.08 per cent to the warehouse and 12.92, to the freight station. Of the total cost of the building, \$5,035,275.05 has been assigned to the warehouse and \$4,163,787.04 to the local freight station facilities. The 12.92 per cent apportionment of the floor space to the freight station was found excessive, since on several occasions it was observed that about one third of this space was used for storage-in-transit of crude rubber for account of the carrier.

By the terms of its lease the warehouse company was never to carry on its books any vacant space, but as soon

as any space used by the warehouse company was vacated, it was to revert to the railroad company, which was to bear the cost of the vacant space. It appears, however, that the warehouse company did actually pay for vacant space.

The warehouse company performs all handling of freight for the carrier, including the unloading of cars and trucking of freight to various locations in the warehouse, including piling, transferring, loading into trucks, and reloading into cars. Prior to June 1, 1931, the carrier paid to the warehouse company the actual cost of stevedoring. On that date the matter was made a subject of contract under which the carrier agreed to pay the warehouse company 58 cents per ton for each handling. As two handlings are necessary it [fol. 89] costs the carrier \$1.16 per ton to place a ton of freight in storage and reload it into car or truck. The consignee, on the other hand, pays the carrier the tariff charge of 20 cents per ton, except on heavy commodities on which a special rate is agreed upon by the manager of the warehouse company and the general superintendent of the railroad.

The warehouse company employs a force of solicitors, and distributes considerable advertising matter. The traffic department of the carrier is also active in the solicitation of freight handled through the warehouse. Solicitation of traffic is an important expense involved in commercial warehouse operation, and the Lackawanna assumes a large part of that expense through its many offices and agents for the warehouse company.

The operation of the warehouse company during the period from March 1, 1930, to November 30, 1931, shows a deficit of \$48,028.85. The president of the warehouse company and certain officials of the Lackawanna agreed upon the apportioning of the expenses between warehouse facilities and freight-station facilities. Based thereon, the operating expenses chargeable to the warehouse operation for the period May 1, 1930, to November 30, 1931, were \$142,630.76, taxes \$108,659.04, and depreciation at 2 per cent per annum \$139,969.58, or a total of \$391,259.35. The total revenue received for the same period for storage and handling of in-transit freight was \$181,718.06, and rental of space leased to the warehouse company \$102,498, or a total of \$284,216.06, leaving a net deficit of \$107,043.32. If we add to this interest on investment on the amount apportioned to the warehouse at 5 per cent per annum amounting

to \$398,625.94, we have a total loss to the carrier through the ownership and operation of the warehouse of \$505,669.26.

That the construction of this warehouse is a railroad venture, designed to compete with the other trunk lines, and to attract traffic to the Lackawanna, is further exemplified in a letter from the general freight-traffic manager of the carrier to the vice president, traffic, in which he states:

It seems hardly necessary to comment that the New York Central now has warehouses galore on its rails in New York City, that the Lehigh Valley has Black Tom (National Stores) on the Jersey Shore, that the Central Railroad of New Jersey has its Jersey City warehouses and that the Lehigh Valley and Jersey Central have independent concerns located at Newark, all now in the market for handling traffic in transit, all of which attracts traffic to their rails as against ours, we having no warehouse facilities whatever on the eastern end of our rails, which necessarily reduces the volume of traffic which we now have an equal opportunity to secure.

[fol. 90] And quoting from a letter of the president of the Lackawanna to the vice president and general counsel, in which he says:

If the Lackawanna operates a warehouse we will be subject to State and Interstate regulations, which I understand makes it impossible to barter for rates of storage of freight, whereas a private corporation could do that.

Will you please give the matter some thought and let me have the benefit of your views on the best thing for this company to do for the development of that property.

Westbound storage-in-transit freight is stored in this warehouse at storage and handling rates published by the Lackawanna. The freight is ordinarily picked up at points in New York Harbor, either at docks or from steamships, and is frequently held at the warehouse for a year or more, and later forwarded to its destination. All handling of freight at this warehouse is done by the warehouse forces and charged to the railroad. Under its published tariff the railroad charges 20 cents per ton for handling the freight into and out of storage, but pays the warehouse 58 cents

per ton, or a total of \$1.16 per ton for two handlings to perform the service, and absorbs the difference of 96 cents per ton.

The Lackawanna moved its local freight station in Hoboken to this warehouse when it was opened for operation. The old quarters remained vacant for approximately six months. At the present time it is occupied by three lessees who use it for commercial-warehouse purposes.

Piers 3, 4, 7, and 9.—The Lackawanna devotes portions of Piers 3, 4, 7, and 9 in Hoboken to the storage of freight in transit both eastbound and westbound, and for the transfer of lighterage freight between boat and car. During 1931, 4.6 per cent of the total tonnage handled at these piers was stored. The first three piers are single deck while Pier 9 is double deck. Based upon computation of our Bureau of Valuation, the total cost of these piers, including additions and betterments as taken from the carrier's records as of December 31, 1931, was \$1,434,698.74. The depreciated value as of that date was shown at \$1,088,139.74.

The total earnings accrued from handling and storage of westbound freight stored or loaded at these piers during the period from December 1, 1930, to November 30, 1931, were \$13,732.69 and on eastbound freight for the same period were \$15,089.06. The total cost of maintenance and operation of these piers for the above period was \$168,231.91. The record does not disclose how the above figures should be separated as between storage and lighterage. The difference between the receipts and expenditures is shown to be \$139,402.16.

A small amount of eastbound freight is stored on Pier 1, and on the bank adjacent to Pier 5. A small amount of eastbound storage-in-transit freight was also stored in cars, [fol. 91] for which the regular eastbound storage rates were assessed. Commodities stored in cars consist of machinery, flour, sawdust, cement, electrical equipment, steel articles, and car parts, while the ground storage consists principally of structural steel, pipe, and machinery. Of the commodities moving westbound, rubber is stored in the greatest quantities, and usually remains in storage from 9 to 12 months. The average length of time miscellaneous commodities are stored is from 3 to 6 months. On east-

bound commodities the average storage period is much less, with the exception of steel, which remains in storage several months.

All handling of freight at Hoboken and Jersey City piers is done by contract labor. On freight handled at covered piers the rate is 35.9 cents per ton, at open piers 12.7 cents per ton, and at grain piers 12.7 cents per ton. Since the stevedoring rate is 35.9 cents per ton and the tariff charge is 20 cents per ton, for handling, both in and out of storage, the carrier incurs a loss of 15.9 cents per ton in handling all westbound freight.

The Lackawanna publishes an insurance rate of 8 cents per \$100 of value applicable to freight in storage, and covers its liability by reinsuring at a rate of 35 cents per \$100 of value per annum. The total amount collected from the shippers during the year ending November 30, 1931, at the 8-cent insurance rate, was \$161.56, and the amount paid out for reinsurance during the same period, was \$733.52.

The Lackawanna also leases from the city of New York Pier 41, North River, including adjoining bulkheads and land under water. The pier and adjoining bulkheads have an area of 89,495 square feet. Prior to May 1, 1932, the annual rental for these facilities was \$44,401.25 or 16.8 cents per square foot. On that date the rental was increased to \$99,675 or 37.6 cents per square foot per annum. The carrier receives from the North German Lloyd Steamship Company \$20,000 per annum for partial use of the water rights.

In 1930 the Lackawanna began negotiations to rent space on this pier to the Quaker Oats Company in an effort to draw traffic, which at that time was moving over the Jersey Central, to its line. The Oats Company did not consider the location on Pier 41 desirable and could not be induced to move except by the offer of an extremely low rental and the making of extensive alterations which it considered necessary to meet its purposes. The Lackawanna offered 10,000 square feet of space on the out-shore end of the pier for an annual rental of \$2,700 or 27 cents per square foot, which was accepted. Alterations were made by the Lackawanna which cost \$5,877.21, which is more than the rental for two years. The Oats Company's lease is terminable upon 30 days' notice.

[fol. 92] New York Central Railroad

The New York Central's warehouse affiliations in the Port of New York district are carried on at a number of warehouses and piers. The principal warehouse properties are buildings owned by the New York Central and occupied by the Kingsbridge Warehouse Company, J. A. Mellish Warehouse Company, Incorporated, F. C. Linde Company, and United Flour Trucking Corporation. Pier 99, North River, and Pier 4, East River, and portions of other piers are leased by the carrier from the city of New York and in turn space thereon is subleased to various concerns. Additional warehouses were in contemplation at the time of the hearing.

Kingsbridge warehouse.—The Kingsbridge warehouse, a 6-story steel-and-concrete building consisting of two units with approximately 300,000 square feet of storage space, was constructed by the New York Central from its current working funds on land owned by it at Two Hundred and Thirtieth Street and Kingsbridge Avenue in the Borough of the Bronx. The last unit was completed in the early months of 1930. The cost of the two units including the land was \$1,395,895. The need for this building from a standpoint of retaining and securing carload automobile traffic was explained to the president of the carrier by one of the vice presidents in a letter of January 21, 1929, when, speaking of the competitive situation, he said:

This situation has not been serious from a traffic standpoint until recently when the Lehigh Valley, Erie and DL&W Railroads have been active in soliciting this character of traffic. Each of these three lines has constructed a number of unloading tracks and platforms and at the present time the Lehigh Valley is constructing a large warehouse for storage purposes. There are a number of warehouses available for storage in the vicinity of the Erie Terminal and the DL&W has announced its plan to construct a warehouse for the storage of automobiles. In view of these activities we deem it necessary, in order to protect the traffic we are now enjoying and to be in a position to obtain additional traffic to provide adequate unloading facilities and warehouse storage at Kingsbridge. As a result of careful study it is deemed advisable to have these facilities available this coming fall, otherwise the indications are that some of the auto-

mobile receivers now using our line will seek quarters tributary to other lines.

At this time it was contemplated building only the first unit and in the letter it was pointed out to the president:

The land at Kingsbridge, on which we propose to construct these facilities, is now idle. Considering the investment in the warehouse proper (\$600,000), if we were to obtain full return on the investment and allow for amortization of the building and for maintenance, taxes and insurance, we should receive as rental	\$49,000
On the basis of 25¢ per sq. ft. we would receive as rental	\$36,000

or	\$13,000
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Less than the full carrying charges on the investment and collateral expenses.

[fol. 93] The vice president had been advised a short time previously, that an operating deficit of \$33,355 would accrue annually on this unit.

On October 1, 1929, the Kingsbridge Auto Storage & Warehouse Company, herein referred to as the Auto Storage Company, leased all of the space in unit no. 1, except one half of the first floor, which was retained for use as a local freight station by the carrier for a term of 10 years at an annual rental of \$30,600, equivalent to 25 cents per square foot. It was found necessary to fireproof this space to comply with fire regulations in connection with "live" storage of automobiles. Such storage permits the car to be fully serviced ready for driving. The fireproofing cost 8 cents per square foot, and an upward revision of the rent to \$40,392 annually was made.

When unit no. 2 was completed, the second and third floors were leased effective July 1, 1931, by the Auto Storage Company. This lease was to terminate at the same time as the lease of unit no. 1. The annual rental was \$13,560 or 25 cents per square foot for the 54,240 feet of space leased. Other space in this building was also leased by this company on an occupancy basis, some of which was subleased to automobile companies. A large amount of space was used by the Auto Storage Company to store automobiles for account of the New York Central.

The Auto Storage Company found the business unprofitable and various downward adjustments in rental were made by the carrier. The loss to the carrier for the year 1931 arising from its ownership and leasing of this warehouse including interest at 6 percent on the investment, was \$109,381.40.

The Auto Storage Company receives automobiles in car-load lots. These are either stored and later delivered in single units or delivered direct without storage to local dealers or at these dealers' directions.

The carrier's arrangements with the Auto Storage Company provide that the latter will perform certain services for the former. These arrangements are shown in a letter dated September 5, 1929, from the carrier to the Auto Storage Company as follows:

As a matter of record and contract, it is hereby agreed, effective October 1st, 1929, that you will

(a) Unload all automobiles and necessary parts from cars at Kingsbridge for \$1.25 per automobile and \$.50 for each delivery you make to consignees, either from the warehouse or from the Railroad property in that vicinity.

(b) After the period of 48 hours' free storage in company building, if consignee orders cars stored your charges to them will be your normal rates, and the Railroad Company will not be responsible for further charges, such cars to be placed in storage only after being released by the Company's agent. When the Railroad Company orders automobiles into storage, the Railroad Company will pay you \$.50 for taking each automobile into storage and \$.50 for making delivery to the consignee and you to collect for the [fol. 94] Railroad account railroad storage tariff rates and in turn bill the Railroad Company for such storage at your normal warehouse rates, such cars to be delivered only upon orders of the Railroad Agent.

(c) The unloading charge of \$1.25 per automobile will include the removal from cars of all braces, blocking and other material used in connection with the stowing of the automobiles and the assembling of such material in a car or in a location specified by the Railroad Company.

During the year 1931, under the above arrangement, the Auto Storage Company stored 2,718 automobiles for the

New York Central. The carrier assessed its eastbound in-transit storage rates and collected \$9,779.84 and paid to the Auto Storage Company for its services, exclusive of handling \$20,316, resulting in a net loss of \$10,536.16, or \$3.87 for each automobile. This loss is additional to that of \$109,381.40 shown above.

It has been shown that the New York Central expected to incur a loss from the storage operations, but it was felt that this loss would be justified by the increased traffic. The prospective loss from the operations of the building was intended to be covered out of the line-haul revenue. To do this it would be necessary for the carrier to increase its automobile business by 1,200 carloads per annum in order to break even.

The president of the Auto Storage Company advised the general superintendent of the New York Central on August 25, 1928, with reference to warehousing conditions at Kingsbridge, and made recommendations for the type of building to be erected and for the solicitation of business. Two of the recommendations in connection with the solicitation were:

That as soon as the building programme is settled that a series of letters be prepared and sent to all interested, advising them of the new warehouse facilities, and that these letters be followed by personal call.

That every automobile dealer in New York be solicited, by warehouse representative, to secure his business for the New York Central Lines, and his storage business for the 60th Street and Kingsbridge warehouses.

The Auto Storage Company acts in the capacity of traffic solicitor for the New York Central. In a letter dated March 1, 1931, from the president of the Auto Storage Company to the manager, industrial-development department, of the carrier, it is stated in part:

We have always felt that this proposition at Kingsbridge was a mutual one. We want to feel that way. Our first thought has been to protect the interest of your company, to retain your old accounts and to get all of the new business possible. We feel that we have done that 100 per cent. If your company agree, then you must put us in a position to make a fair return on our investment, otherwise we both lose.

Another instance of soliciting business is shown in a letter dated September 22, 1930, from the president of the [fol. 95] Auto Storage Company to the assistant general manager of the carrier, reading in part as follows:

If we succeed in getting this business it will mean approximately 500 carloads of incoming freight per year and in addition two and one half million pounds of L.C.L. outbound freight which will have a tendency to control all incoming automobile shipments of the Buick Motor Car Company It is very important that something definite should be given to the New York Buick at once.

Further correspondence shows that in the above instance the traffic was retained by lowering the rental to the Buick Company.

The Auto Storage Company also leased from the New York Central on January 29, 1930, a 3-story concrete building with total floor area estimated at 40,000 square feet, located on West Fifty-fifth Street, at an annual rental of \$12,500. This building was subleased to the Franklin Automobile Company at the same rental. In September 1931 the Auto Storage Company was forced to reduce the rental to the Franklin Company to \$10,000 and on the same date secured a reduction in its rent to the same amount. On April 1, 1932, the Auto Storage Company made another reduction to its tenant and secured from the carrier a further reduction to \$5,000. The taxes paid by the carrier on this property amounted to \$9,000 per year.

Jay A. Mellish Warehouse Company, Incorporated—This company is closely affiliated with the Auto Storage Company. The New York Central leased to the Mellish Company a warehouse building known as the Old Sheep House and the first and second floors of building known as the Rossiter Stores at an annual rental of 6.25 cents per square foot of space per annum, which is from one eighth to one tenth of the usual rate obtained for warehouse space in New York City. Automobiles are unloaded, stored, and distributed from the Old Sheep House under the same arrangements as apply at the Kingsbridge warehouse and the same charges and allowances are made. During the year 1931 the New York Central incurred a loss of \$3.50

for each of the 3,240 automobiles stored by the Mellish Company, or a total loss of \$11,335.13, exclusive of handling charges. The loss on the Sheep House property computing interest on the investment at 6 per cent was \$24,942.61. The record shows that, on the westbound merchandise stored by the New York Central with the Mellish Company at Rossiter Stores during 1931, it cost the carrier \$3.11 per ton, or \$24,068.69 on the 7,736 tons stored, over and above the amount it received for storage and handling charges based on the carrier's tariff rates.

Linde warehouse.—The New York Central leases to the F. C. Linde Company the second and third floors of a 3-story building known as the St. John's Park warehouse. The first [fol. 96] floor has for many years been used by the New York Central as a local freight station. The floor space leased aggregates 333,506 square feet and a rental of \$50,000 per annum is paid. The rental is considerably less than the taxes on the property, which in 1931 were \$65,824. This latter amount of course includes the taxes on the portion retained by the carrier. In addition the New York Central bears the miscellaneous expenses, such as insurance, interest on investment, etc.

The Linde Company stores in-transit freight for account of the New York Central, at rates of 2 cents per 100 pounds for the first 30 days, and 1 cent per 100 pounds for each additional 15 days, plus 4 cents per 100 pounds for handling in and out of storage. The carrier collects from shippers under its tariff 1.5 cents per 100 pounds for the first 30 days' storage, and 0.5 cent for each succeeding 15 days or fraction thereof, plus 1 cent for handling in and out of storage. This arrangement results in a heavy loss to the New York Central. Revenue from storage and handling at tariff rates for the year 1931 amounted to \$15,158.35. It paid to Linde Company for storage and handling this freight \$28,578.07, resulting in a net loss of \$13,419.72, an average of \$1.285 per ton on the 10,443 tons stored during the year. The carrier argues on exception that the rental received was the best it could obtain, and that it was to its interest to accept this amount rather than let the property remain idle. This does not explain why it should pay the Linde Company rates for storage and handling in excess of its tariff rates.

United Flour Trucking Corporation.—Space in the freight house of the New York Central at Port Morris and an adjoining building known as the Hillman Building is leased to United Flour Trucking Corporation, hereinafter termed the trucking corporation, at 45 cents per square foot per annum for space actually used. The freight house is made up of three units with a total area of 11,400 square feet. The rent is computed by a daily measurement of the unoccupied space, which is deducted from the total area, and at the end of the month space used daily is averaged. During each of the 12 months ended March 31, 1931, the trucking corporation paid for an average of 8,511 square feet per month. The total expense to the carrier in 1931 including interest at 6 per cent on investment of \$74,544.80 and depreciation at 2 per cent was \$6,874.30 and the income was \$3,654.38.

By resolution of April 30, 1930, the executive committee of the New York Central authorized the expenditure of \$54,000 for additions to the freight house, to be leased to the trucking corporation at 45 cents per square foot per annum. This would increase the facilities so that the trucking corporation could centralize its business at Port Morris and discontinue operations on the Lehigh Valley.

[fol. 97] The trucking corporation also leases the Hillman Building, which contains 5,250 square feet of storage space and is used for the storage of flour. It pays for approximately 4,200 square feet per month and the carrier bears the loss of aisle space. The income from the Hillman Building consist of rent from the trucking corporation of \$1,952. Annual expenses including interest and depreciation for 1931 were \$8,163.29. The New York Central employs the trucking corporation to unload^acarload freight and makes an allowance of 3 cents per 100 pounds, or 60 cents per ton therefor, which during 1931 aggregated \$66,343.18.

Freight stored in cars at Port Morris by New York Central consisted of a large amount of flour eastbound. Some of the flour is loaded in New York Central equipment, but a good portion of it is held in cars of foreign ownership, on which the New York Central pays a per diem charge of \$1 per car per day. No storage charges were collected by the carrier on these cars.

Rental of pier space by carrier.—Many of the piers along the waterfront in New York City are owned by the municipality, while others are owned by private interests including respondent carriers. In some cases the carriers lease the piers, and then sublease in whole or in part to various concerns including storage and trucking companies.

The Luckman Terminal Storage Company leases space on Piers E and F and 4 and all of Pier 99 from the New York Central, which owns the two former and leases the two latter from the city. The lease to the Luckman Company is on an occupancy basis, the Luckman Company paying for used space on a basis of 4 cents per square foot per month. At Pier 99 the carrier hires the Luckman Company to unload the freight from car to pier at a rate of 3 cents per 100 pounds. Unloading is done at Piers E and F by carrier employees.

In 1931 the Luckman Company paid \$7,286.28 for the space occupied on Piers E, F, and 99, while the New York Central paid \$15,435 rental for Pier 99 alone. On October 31, 1931, the city proposed to increase the rent for Pier 99 to \$86,534 annually. The outcome of that proposal and the amount of rent now paid are not disclosed by the record.

During 1931 practically the only tenant of Pier 4 was the Luckman Company and the total rent received by the carrier under arrangements similar to those at Pier 99, was \$3,897.48. The New York Central pays an annual rental of \$42,915 for this pier.

United States Cold Storage Corporation.—In addition to the space already devoted to the storage and warehousing business by the New York Central, heretofore discussed, [fol. 98] and notwithstanding the fact that the respondents have sustained large money losses in existing warehouses, the evidence shows that at the time of the hearing this carrier was considering the building of additional warehouses and storage facilities in New York City to be operated by the United States Cold Storage Corporation, herein termed the Cold Storage Corporation.

This Cold Storage Corporation was organized under the laws of Delaware, and has its general office at Chicago, Ill. It is engaged in the cold-storage warehouse business at Detroit, Chicago, Kansas City, and other points, and acting for the owners it ships merchandise, including cold-storage products, over the lines of the New York Central to New

York City and competes for business with warehouses in the New York district.

At the time of the hearing the New York Central was erecting a proposed 12-story building with basement on Spring Street in Manhattan, between King and Charlton Streets, herein referred to as the Spring Street warehouse. The plans called for a structure with approximately 850,000 square feet of warehouse space in the nine upper floors which were to be devoted to storage of freight, and the three lower floors were to be used for freight-station purposes. The second or track floor was to have a freight-car capacity of 203 cars serving the platform. Early in 1932 the carrier applied to the Reconstruction Finance Corporation for a loan of \$2,300,000 to enable it to proceed with the construction of this building, but the application was withdrawn. On exceptions it is stated the tentative arrangements referred to have been canceled and that the present plans contemplate the construction only of the new freight station at Spring Street. It is of interest to recite in that connection, that July 7, 1931, the New York Central purchased 33,000 shares of the common capital stock of the Cold Storage Corporation which had no par value and paid therefor \$2,215,620, equivalent to \$67.14 per share. These shares approximate 44 per cent of the total issue of 75,000 shares of common stock of the corporation outstanding at that time. The purchase of this stock appears to have been definitely related to the arrangement for the operation of the proposed Spring Street warehouse by the Cold Storage Corporation.

Although the carrier paid \$67.14 per share for this stock, quotations issued by a brokerage house in Chicago on various dates during the period from April 17, 1931, to January 16, 1932, shows that the bid prices ranged from \$20 to \$38 per share. Also according to two daily newspapers, issued in Chicago, the market price of this stock on July 5 and 6, 1932, was "no bid" and "asked" \$10 per share.

[fol. 99] The book value at the close of the years 1930 and 1931, as shown by the fifth and sixth annual reports of the Cold Storage Corporation, was as follows:

	Number of shares	Book value	Value per share
Year 1930	42,000	\$1,658,923.28	\$39.50
Year 1931	75,000	3,658,628.08	48.78

The several comparisons indicate that the price paid for this stock by the New York Central was greatly in excess of the market price. This fact must have been known to the purchaser and the real motive underlying the transaction is indicated in a letter from the president of the Cold Storage Corporation to the vice president in charge of freight traffic of the New York Central on May 9, 1931, as follows:

Another point raised was in connection with the purchase of stock.

The United States Cold Storage Corporation is today neutral and, on that account, has the cooperation of all the carriers and warehouses naturally tributary to its various plants. When we enter into an arrangement which will definitely align us with your system, we naturally will lose some of the benefits accruing from our present neutrality and we, of course, could not afford to consider such a change in policy unless your people were substantially interested with us and thereby we would be insured compensating support from your organization.

When it is understood that the United States Cold Storage Corporation and its affiliated companies handle at present, in and out of its present houses 30,000 cars per annum, and expect to handle 18,000 at New York and 10,000 to 15,000 cars at Atlanta, a large share of which can be routed via the New York Central Lines, the pecuniary interest suggested does not seem to us at all out of proportion.

It appears that the New York Central was committed to lease the nine stores and certain platforms and driveways over the freight station to the Cold Storage Corporation at a rental of 50 per cent of the gross receipts from commercial warehouse operation therein, subject to a minimum annual rental of \$50,000. The carrier was to pay the taxes and insurance on the building. The term of the proposed lease was to be for five years and it provided in part that:

In case the gross revenue for the first two years is less than \$400,000 there is to be an adjustment of the rental whereby the lessor will return to the lessee any deficiency between the lessee's earnings and the lessee's operation and maintenance expenses up to 10 per cent of the gross revenue; such adjustment, however, not to reduce the annual rental below said minimum of \$50,000 per annum.

It further provided that:

In case at the end of the second year or subsequent thereto the rental shall be deemed by either party to be unsatisfactory, then a revision of the rental may be made either to be [fol. 100] agreed upon by the parties or determined by an umpire agreed upon by the parties or appointed by the court.

It appears that the carrier estimated that the gross revenue from the operation of the proposed warehouse would exceed \$360,000 annually, based on an average occupancy during normal times, 50 per cent of which sum would return to the carrier interest of 5 per cent on its investment in the additional nine stories, plus amortization, taxes, and insurance. It is apparent, therefore, that there was no assurance that the annual revenue would reach the carrier's expectations.

The relationship between the New York Central and the Cold Storage Corporation, in connection with this proposed Spring Street warehouse, might be termed that of a partnership, in which the carrier would accept a percentage of the revenues from the commercial warehouse business in lieu of fixed and certain compensatory rent, the carrier to assume the investment risk and charges. It is obvious, therefore, that this whole arrangement, on the part of the carrier, was designed to attract the traffic, moving from the numerous affiliated plants of the Cold Storage Corporation, to the lines of the New York Central.

Erie Railroad Company

One of the earliest and most active carriers in the development of the present warehousing situation in the Port of New York district was the Erie. Its activities and participation are described in connection with the operations of the Seaboard Terminal and Refrigeration Company, the Long Dock Company, and Lorillard and Ault-Wiberg Buildings, the arrangements with the United States Trucking Corporation, Tooker Storage and Warehousing Company, Erie lease of Pier 67, and additional Erie warehouse arrangements.

Seaboard Terminal & Refrigeration Company—For many years before 1923 the Erie had enjoyed a substantial portion of the California fruit and vegetable traffic destined to New York. About this time the Erie felt that its competitors,

among them the Pennsylvania, were securing a larger percentage of this traffic than such competitors had enjoyed in past years. Consideration by the Erie as to how their traffic might be retained and the percentage thereof increased by the use of modernized and convenient handling facilities led to the formation of the Seaboard Terminal and Refrigeration Company, hereinafter called the Seaboard Company, incorporated in New Jersey on June 23, 1926.

On July 31, 1926, the Erie and two of its subsidiaries* leased to the Seaboard Company a plot of ground 200 by 400 feet near the terminal of the Erie in Jersey City for the purpose of erecting a warehouse and freight station thereon. The lease covering land is for 30 years with the privilege of renewal for 10 years; at which time the building is to revert to the lessors. It contains provisions by which the Erie may purchase the building at the end of 20 years, if it so desires. The lease provided also for the lease by the Erie of the four lower floors, containing 320,000 square feet of space in the proposed building, which was to contain eight floors and to be constructed to carry two additional floors. The design and construction of this building were to be satisfactory to the Erie's chief engineer. As completed, the building contained 10 stories. The Erie was obligated to install necessary tracks on the first and third floors, and to perform certain construction work, such as fills, tracks, approaches, and retaining walls, which it did at a net cost of \$656,283.79. The six upper floors were to be used for a cold-storage plant by the Seaboard Company. The estimated cost of the first eight floors of the warehouse building was \$3,500,000. The actual cost for the completed building, including the value of the land and the capital expenditures of the Erie, was \$5,974,813.59. The rent to be paid by the Erie for the four lower floors was to be 10 per cent of 55 per cent of the cost of the first eight stories. Tentative rental payments of \$176,000 per year began from November 1, 1927. The proper amount was later computed to be \$196,337.69 per year, which payments began January 1, 1929. A claim of back payment was made by the Seaboard for the difference between these two amounts covering the period from November 1, 1927. The record indicates that the rental first paid was at least \$45,837 per year in excess of what it should have been,

*Penhorn Creek Railroad Company, and Erie Land and Improvement Company.

based on 10 per cent per annum on the estimated cost of construction of the four lower floors. It is not disputed that the basis of computing the rental on this building was decidedly advantageous to the Seaboard Company.

The primary purpose of the Erie in entering into the arrangements with the Seaboard was to transfer its delivery point for fruits and vegetables from its Duane Street piers in Manhattan to the site in Jersey City which was convenient to the Jersey end of the new vehicular tunnels. This would obviate the necessity of car floatage across the river and avoid crowded conditions at Duane Street. The Erie felt that by providing modern auction facilities, coupled with an available cold-storage space at the new location, the fruit-auctioning business would be transferred there and bring it increased traffic.

The Seaboard Company, independent of the Erie, but on land it leased from the latter, erected a large ice plant. It also erected an elaborate and modern type of building especially designed for the auctioning and selling of fruits and [fol. 102] vegetables on nearby land purchased by the Seaboard for this purpose. The fruit and vegetable dealers could not be induced to transfer their activities from the old location to the new, and the auction facilities provided were never utilized. As a result the Erie found itself obligated by lease for a large amount of unproductive space, which it made no use of until 1929. There is testimony to the effect that the Erie had no need for the Seaboard warehouse for its common-carrier service, and that its Jersey City freight house was ample to provide all necessary common-carrier facilities. In the early part of 1929, however, the Erie transferred its Jersey City freight station to the Seaboard building. Its station activities required but a relatively small part of the space rented, and the remainder was utilized as a warehouse for westbound carload freight. The auction house which the Seaboard had built on its own land had never been used. As this building was a part of the plan to have the fruit dealers move to the new location, the Erie was induced by the Seaboard to relieve it from the expense of carrying the idle premises, by renting this auction house for a local freight office at a rental of \$25,000 per year.

In January 1929 the Erie released to the Seaboard Company 43,638 square feet of space on the four lower floors of the warehouse which it held under the lease, for use and occupancy by the Kraft Phoenix Cheese Company, which

company then leased the space from the Seaboard for 5 years with the privilege of renewal for a like term at 32 cents per square foot per annum. In consideration of this release the Seaboard Company reduced the rental of the Erie by a credit of \$23,865.80, which reduced the annual rental to the Erie to \$172,471.89. The Erie paid the Seaboard Company for making changes necessary in preparing the building for occupancy by the Kraft Company.

Various companies have rented warehouse space in the Seaboard building for 50 cents per square foot of gross space per year, and there is ample evidence that this figure is not unreasonably low for such space in Jersey City. The warehousemen's principal witness testified that 44 cents per square foot per year was a reasonable rent. The cost to the Erie under the original lease of the Seaboard building amounted to 85 cents per square foot per year, not including space occupied by the railroad tracks. On May 31, 1932, the same space after various releasing and subletting transactions, was costing the Erie \$1.13 per square foot per year. Mention has been made of space originally leased by the Erie and later occupied by the Kraft Company and the reduction in rent to the Erie by this means. Notwithstanding such reduction the Erie continued to pay to the Seaboard from 25 to 35 cents per square foot depending on location for space occupied exclusively by the Kraft Company, the cost annually for such space totaling \$13,226.50.

[fol. 103] On July 1, 1931, the Erie released 11,483 of its leased space on the fourth floor of the Seaboard, which in turn then leased this space to the Great Atlantic & Pacific Tea Company for 50 cents per square foot, and there remained 35 cents per square foot, or \$4,019.05 per year, to be paid by the Erie to the Seaboard for this space. On May 1, 1932, the Erie leased direct to the above tea company 11,718 square feet, approximately one third of the third floor, at 50 cents per square foot per year. Necessary alterations cost \$9,168.85, which were paid for by the Erie. The Erie lost \$4,101.30 annually, in addition to the cost of alterations. Before locating in the Seaboard building the tea company had been leasing space in New Jersey for which it paid 60 and 80 cents, per square foot.

Both the Kraft Company and the tea company are large shippers of desirable traffic, which the Erie now largely participates in by reason of the location of these companies in the Seaboard building.

The Albert and Gerber Company subleased 3,618 feet of the Erie's space, for which it pays 50 cents per square foot per year. This results in a loss of \$1,266.30 per year to the Erie.

There is no evidence of record that either the Erie or the Seaboard own any stock of each other. But the relations between the two companies were very close as shown by the leasing arrangements, and the evidence shows that the president and other officers of the Erie were greatly interested in the selection of officers of the Seaboard Company and the tonnage it might bring to the Erie. It is vigorously contended on brief filed on behalf of the warehousemen that the dual activities of the Erie and the Seaboard constitute a partnership. It is difficult to separate the actions of one from the other.

Such an arrangement between the Erie and the Seaboard Companies could and doubtless would seriously affect any independent warehouse company operating in competition with them. Evidence shows that storage has been obtained in the Seaboard warehouse at rates far below rates previously paid elsewhere by the owners of the commodities stored. Moreover, the Erie is standing much of the financial loss of the Seaboard by reason of the high rent it pays for space in the Seaboard Company's building. This rental is sufficient to pay the major portion of the interest on investment and fixed charges, which enables the Seaboard Company to engage in the storage and warehouse business at rates ruinous to competition.

After the space in the Seaboard building had been occupied by the Kraft, Atlantic & Pacific, and Albert and Gerber Companies, approximately three fourths of the space originally leased by the Erie remained on its hands, but notwithstanding, additional space on the upper floors of the building was also rented by the Erie at a rate of 50 [fol. 104] cents per square foot per year. It is not shown whether this space was ever occupied. In 1931 westbound freight in transit stored in the Seaboard building by the Erie amounted to 20,021 tons, which storage was accompanied by a financial loss to the Erie of \$123,809.65, or \$6.18 per ton.

Long Dock Company.—In May 1929 the traffic officials of the Erie urged securing of additional storage space for traffic reasons, and advised the purchase of the Standard

Milling Warehouse Corporation's 6-story concrete building 378 feet by 87 feet, containing a total of 196,116 square feet and located on the water front in Jersey City. It was erected on land owned by the Erie and its wholly owned subsidiary, the Long Dock Company, and leased to the Milling Company. When erected it appears to have cost in excess of \$2,000,000. It is served by sidetracks connecting with the Erie. The building and all right, title, and interest of the Milling Company in the lease were purchased in September 1929 by the Erie Land and Improvement Company, a real-estate holding company also wholly owned by the Erie, with funds advanced by the Erie, for \$600,000, of which \$150,000 was paid at the time, the balance to be paid in five equal annual installments of \$90,000 each with interest at the rate of 5.25 percent per annum.

The dock company operates the warehouse, and collects the storage charges from commercial storage and pays the expenses of the warehouse building, including the cost of labor and handling of freight, wages, and miscellaneous expenses. An official of the Erie is manager of the dock company, which also operates a grain elevator in Jersey City. At the time of the purchase of the building there was a considerable quantity of goods stored therein by the Milling Company as a warehouseman. These goods were by agreement turned over to the Long Dock Company, which has since conducted a commercial warehouse business in the part of the building which is not used by the Erie for storage of transit freight. Ten percent of the net revenue from its operations is retained by the dock company as its compensation, and the balance is paid monthly to the Erie Land and Improvement Company as rental. The taxes, insurance, interest on investment, and other overhead charges, are borne by the Erie Land and Improvement Company.

In the operation of this building no designated space is reserved to the dock company for its operation as a warehouseman nor to the Erie for the use of storage of its in-transit freight. Both companies store goods indiscriminately on each floor. The principal commodities stored by the Erie are crude rubber, sugar, asbestos, and matches. A total of 26,450 tons of such commodities were stored [fol. 105] there in 1931, on which the Erie assessed its published tariff charges. The record does not show whether the Erie paid anything for space occupied.

In 1931 the Erie Land and Improvement Company sustained a loss of \$62,057.22 on in-transit freight stored for the Erie in this building, averaging \$2.76 per ton on the 26,450 tons stored. In effect the Erie is conducting a commercial warehouse activity in this building through its subsidiaries, and must stand any loss and will receive any profit made. An additional loss of \$10,920 would be added if a return of 6 percent on the value of the land is considered.

Lorillard and Ault-Wiborg Buildings.—On January 1, 1930, the Erie secured the P. Lorillard Company's Annex Building at Senate Place and Dey Street in Jersey City, N. J., on a monthly lease at a rental of \$3,534.93 per month, the lessee to maintain and keep in repair elevator, electrical works, fire doors, and sprinkler system. The Erie was also to pay \$175.50 monthly for night watchman. A second lease dated November 22, 1930, secured 156,826 square feet of space in the Lorillard B Building in Jersey City at a rental of \$62,730.40 per annum, payable monthly in advance. This lease was for one year, and thereafter until canceled on 30 days' notice by either party. Watchman service, amounting to \$4,061.79 per annum, was to be paid by the Erie, as were the maintenance items, as at the other Lorillard building. Another building in Jersey City, known as the Ault-Wiborg Building, was leased by the Erie January 1, 1931, at a monthly rental of \$2,000. This lease was canceled May 1, 1931.

The above three buildings were used principally for the storage in-transit of westbound crude rubber during the years of 1930 and 1931. A letter from the president of the Erie to the vice president pointed out the fact that a loss of \$83,866.65 had been sustained in the expense of labor and storage of 46,693 tons in these buildings in 1931. This amounted to \$1.80 per ton. Inquiry was made, "How long have the present storage and handling charges been in effect? Is there any reason why they should not be increased to more nearly cover the expense?" The vice president replied:

These tariff charges have been in effect without change for a number of years They are less than warranted by regular commercial warehouse storages but contemplate revenue consequential upon road haul movement of traffic. While these low rates have been complained of

by private warehouse owners there has been no way found as yet for advancing them.

He further pointed out that a large volume of traffic had been secured "entirely due to our ability to accept ship-
[fol 106] ments for storage when and as offered." The losses of the individual buildings in 1931 were as follows:

Building	Tonnage	Loss per ton	Total loss
Lorillard (Annex)	23,062	\$1.50	\$34,684.91
Lorillard (B)	25,975	2.06	53,509.94
Ault-Wiborg ¹	3,338	3.24	10,815.82

¹ 4 months' operations.

Arrangements with United States Trucking Corporation. —The United States Trucking Corporation, Independent Warehouses, Incorporated, and the Erie Railroad are members of the same corporate family of which the Allegheny Corporation is the head. The U. S. Trucking Corporation is engaged in trucking freight in the Port of New York district. Independent Warehouses, Incorporated, operates several commercial warehouses in Manhattan in which it conducts a general merchandise-warehouse business. The Erie names four of these warehouses in its published tariffs as its inland freight stations, although they are not reached by railroad sidings. Freight is trucked to and from these warehouse stations for the Erie by the U. S. Trucking Corporation. The compensation or allowance for this service is paid by the Erie. There is no evidence that the Erie uses these warehouses for the storage of in-transit freight, or for warehousing.

The record shows that the Erie has paid the U. S. Trucking Corporation 6 cents or more — 100 pounds for trucking goods to the Independent Warehouses, Incorporated, which were stored by the latter company in its warehousing business. Patrons of these warehouses may thus route their traffic over the Erie at a cost 6 cents or more per hundred pounds lower than shippers who patronize commercial warehouses which do not have the advantage of the railroad paying for the trucking thereto. The result is that business has been diverted to the Independent Warehouses, Incorporated, from other competing commercial warehouses.

On July 1, 1931, the United Flour Trucking Corporation leased space for the storage of flour in the warehouse of

the Long Dock Company in Jersey City, and advertised to prospective patrons that free lighterage could be obtained by routing their shipments of flour for storage in the Long Dock Company warehouse by reason of the arrangement between the Erie and the U. S. Trucking Corporation for trucking service to the inland freight stations in Manhattan. The record shows a warehouse company in Newark lost virtually all of its flour traffic to parties taking advantage of these trucking arrangements. At that time the compensation paid to the U. S. Trucking Corporation by the Erie was 11 cents per hundred pounds for transferring [fol. 107] carload freight from the Jersey City terminals to the inland freight stations in Manhattan. The U. S. Trucking Corporation sublet the work of trucking flour to the United Flour Trucking Corporation at the rate of 6 cents per 100 pounds, and out of the balance paid 90 cents per ton to the Independent Warehouses, Incorporated, leaving 10 cents per ton for itself.

Tooker Storage and Warehousing Company.—Effective February 1, 1928, the Erie leased approximately 32,264 square feet of storage space in its Twenty-eight Street freight house to the Tooker Storage and Warehousing Company at an annual rental of \$9,000. This freight house has not been used since 1927. This concern conducts a general storage and warehouse business on the premises. The value of this property was assessed at \$104,000 in 1930, and taxes paid on this assessment amounted to \$2,828.80. The reproduction cost of this warehouse less depreciation is shown to have been \$253,065.66 as of December 31, 1931, and the value of the land \$193,515, a total value of \$446,580.66. A return of 6 percent of this value plus taxes paid, equals \$29,623.64. In 1931 the total rental received by the Erie from all sources on this property was but \$10,450, which would indicate a net loss of \$19,173.64 to the Erie.

Erie lease of Pier 67.—The Erie has leased Pier 67, and the southerly half of the bulkhead between Piers 67 and 68, North River, from the city of New York for a number of years. The space at the adjoining bulkhead is occupied by an Erie float bridge which is used in reaching its Twenty-eighth Street Station. The record shows that the lease of Pier 67 was made primarily to protect the water rights which permit free and uninterrupted access to this float bridge. The current rental for the year, exclusive of the

amount paid for the space at the adjoining bulkhead, as \$55,175.40 per year, and other expenses, including insurance and watchman service, make the total cost of the space \$58,542.80.

Since June 1, 1928, Willys Overland, Incorporated, has used the pier for the storage of automobiles, and at the time of the hearing was occupying the entire space under a monthly lease effective May 15, 1931, at a rental of \$500 per month or \$6,000 per year, which was \$52,542.80 less than the Erie was paying for the pier. In 1930 the Erie's loss on this leased property was approximately \$60,000, which was nearly equal to the gross revenue received from all line-haul traffic of the Willys Overland, Incorporated, from Buffalo, where this traffic is received, to New York, and for all the handling incident thereto.

Additional Erie warehouse arrangements.—In addition to the foregoing warehouses, the Erie uses two docks at Jersey City and three at Weehawken for storage purposes. [fol. 108] Leases of comparatively small amounts of storage space at these docks have been made to various concerns for storage of flour and salt.

Notwithstanding the fact that many of the losses shown herein had occurred before 1930, the Erie, in order to obtain traffic for its line, was then considering and planning for additional storage space during the next five years. It felt that the need for such facilities would increase and that by securing space industries would locate thereon that would favor the Erie with traffic. As one official stated the proposition, "Our traffic is going to be influenced by the facilities available. The fact that railroads are now increasing the storage time on some traffic indicates a longer time for the railroad to assume the burden." Further, it was pointed out that Erie competitors were either building or had just completed extensive warehouse facilities, and it felt that it had to do likewise in order to hold and obtain its share of the traffic.

Summary of Complaining Warehousemen's Testimony

The complaining warehousemen, hereinafter referred to as complainants, offered testimony, supported with extensive exhibits, by numerous witnesses. Their warehouses, both merchandising and cold storage, are engaged in the storage and warehousing of goods shipped in interstate

commerce to and from all sections of the United States by respondents, and their business is dependent for existence upon the respondents' common-carrier transportation service coupled with reasonable and nondiscriminatory rates and practices.

The seven trunk-line respondents have extended financial aid to their various warehouse affiliations. This aid, complainants contend, amounts to subsidies and rebates and subjects them to unjust discrimination and to undue and unreasonable prejudice and disadvantage, and makes it impossible for them to solicit or handle any business without taking into consideration the respondents' storage practices, rates, and charges, and meeting these on a competitive level. Complainants contend that they are precluded in practically all cases from meeting the less-than-cost rates for storage, handling, and insurance, which respondents offer as an inducement to secure traffic for their lines. It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which complainants cannot meet.

They contend and attempt to show that the plan of rate making for the storage of goods followed by respondents is not sound or practical, and does not reflect the difference in the cost of storing light bulky freight and that of heavy density.

[fol. 109] The solicitation of goods for warehousing is an important activity in the conduct of the business. Respondents have and use their active and efficient traffic departments for the solicitation of business throughout the country. The warehousemen, with their smaller forces cannot compete in this respect, and claim that section 15 (11) of the act, which prohibits common carriers from giving information to one competitor concerning the shipments of another competitor shipping over lines of that carrier, is nullified by the fact that where the carrier itself is a competitor it has the information which gives it, as a competing warehouseman, undue advantage.

Complainants offered testimony and exhibits, neither of which was refuted by respondents, which show that they

have lost business in practically every form of warehousing to the respondents' affiliated warehouse and storage companies. They claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider trade activities and not common-carrier service.

The warehousemen claim that participation of the railroads in warehousing is destructive in the same degree to its competitors therein as it would be destructive to manufacturers of any commodity which the railroads might attempt to manufacture, for the reason that the railroads are not dependent on profit arising from their warehouse activities. Complainants also point to the large financial losses of respondents in their warehouse activities, and to the fact they can use their freight revenues to offset their losses, which the competing warehouses cannot do.

Warehousing and storage are highly specialized businesses, as many commodities must be segregated and many require special equipment in handling. A commercial warehouseman can choose the commodities he wishes to store, as it would not be practicable for any company to build many special commodity warehouses to store any and all commodities offered. The tenor of complainants' testimony was to the effect that the competition of the railroads would ultimately drive independent warehousemen out of business, with the result that railroads would then be called upon to deal in all of the various forms of specialized storage. One witness expressed the opinion that the engagement of the respondents in commercial warehousing in the Port of New York district had not increased the flow of traffic through the port as a whole and stated:

It may be that one of the trunk lines obtained temporary traffic advantage over some or all of its six competing railroad systems, but ultimately if one matched the concessions of the other and after the circle was completed, the result was that they were all doing business on a lower basis of rates. The concessions in the form of reduced rates for the commercial warehousing and storage which they [fol. 110] perform, plus their rates for rail transportation at the lower basis without increasing the traffic handled at or passing through the Port of New York. In short, if they had refrained from performing commercial ware-

housing and storage, they would have the same tonnage of traffic at their higher published rates.

The vice presidents in charge of traffic of four respondents were subpoenaed at the request of counsel for certain warehouse interests, and afforded full opportunity to testify as to their companies' policies and practices with respect to their warehouse operations in the Port of New York district.

The vice president of the New York Central disclaimed having any more than the most meager knowledge of the situation, or any of its elements, and claimed to be unable to define the company's present or future policy in regard thereto, although he admitted knowing that the warehouse situation had been a subject of study by the freight-traffic managers of the respondent carriers for some time. So far as this traffic official knew, no analysis has been made to determine whether his road had lost money on storage operations during the time such activities had been in his charge. The witness expressed the opinion that any losses sustained in terminal operations might well be met out of revenue derived from all of the line-haul traffic, and cited competition for traffic among the carriers as one of the reasons for building warehouses and the measure of the charges for storage. In this witness' opinion the prospects for securing a reasonable return on investments in new warehouse construction contemplated by his company were not good.

The vice president of the Lackawanna, with many years experience as a traffic official who has been active in the promotion of his company's warehouse activities and is familiar with the general policy of the management, testified that it is reasonable to conclude that the only reason for the Lackawanna's low charges for west-bound storage was the competition of other carriers. The witness, speaking of the low charges, stated: "I don't think anyone can say that there is any money to be made out of this, . . . there is no use to beat around the bush, this storage over here does not pay its way." The Lackawanna joined the other carriers in the study previously mentioned, which aimed to secure more compensatory rates. The failure to take action looking to the establishment of such rates was said to be due to the fear that increased rates would result in loss of traffic then moving through the port of New York to other Atlantic

and Gulf ports. 'The witness' testimony with respect to the latter ports, taken as a group, is unconvincing.

[fol. 111] The Pennsylvania's vice president testified that for more than a year he had had an active part in the deliberations attendant upon the policy of the New York carriers in respect to an upward revision of the westbound storage rates and that no conclusion had been reached. Based on his many years practical experience, this witness expressed the opinion that no single item of transportation could be separated, but that the line haul, together with terminal rates and facilities must be considered in the development of traffic for the railroads.

As a matter of policy the Pennsylvania does not prefer direct engagement in the storage business, although it has a measurable financial interest in various concerns which are conducted independently as commercial warehouse operations. Competition of other lines is not the only reason for the direct engagement of this company in the storage business in the Port of New York district: The competition of other ports, of other forms of transportation, such as motor trucks, barge lines, or other forms of water transportation, as well as the fact that private commercial warehouses can change their rates for storage without restriction of tariff regulations, played a large part, and in his opinion made an upward revision of the storage rates inadvisable, although he was informed that the record showed the charges to be below the cost of service, and even though a year or so previously he had inclined to the suggestion that such revision was advisable.

The witness, speaking for the Pennsylvania alone, admitted that this carrier had injected itself into a situation where the competition of unregulated warehouses was met. He justified the carrier's participation in the westbound storage business at New York Harbor by the statement that the practice promoted commerce and kept traffic to the railroads. He contended that the practice was no different from many instances where railroads were required to furnish facilities, such as stations, where there was no possibility of securing a remunerative return per square foot based upon money invested in them.

The vice president of the Lehigh Valley testified that his railroad had reached no conclusion as to whether an upward revision of the rates should be made.

Respondent's Testimony

The chairman of the committee of freight-traffic managers of the carriers serving north Atlantic ports, which for some time has considered the matter of revised westbound storage rates at New York, appeared and testified for this committee. His testimony may be taken as representing the respondents' position in this proceeding.

[fol. 112] Respondents admit that many of the rates in question are too low to be remunerative, but deem it inexpedient to make every individual service profitable. The respondents' controlling thought has been that traffic would be lost to other ports and other forms of transportation by upward revision of rates. As to the north Atlantic ports, the witness admitted that the carriers in New York have virtually complete control of the situation and that competition from these other ports would not restrain an increase in the rates. While considerable of his testimony referred to competition of the South Atlantic and Gulf ports, only slight supporting evidence was presented, and the testimony does not bear out the contention of serious competition. The same may be said of the other forms of transportation.

A witness for the New York Central introduced exhibits comparing the occupied warehouse space and other similar data for the New York area with other sections of the country and with the United States as a whole. His own conclusion, as drawn from these exhibits was "That the metropolitan district of New York, in relation to warehousing has been very satisfactorily treated as compared with the United States as a whole, and really the serious situation has been the depression in business, which everybody has suffered from." The plain inference to be drawn from this evidence is that but for the depression the carriers would have profited through their warehouse operations. While the value and completeness of the facts shown in the above-mentioned exhibits were rebutted by the commercial warehousemen, the record otherwise conclusively shows contrary to the view expressed by the carrier's witness. Our endeavor in this investigation is directly concerned with the practices of railroads in the warehousing and storage of property at the Port of New York district. Conditions and practices at other localities are of little value in determining that question.

After a proposed report was issued, respondents sought an extension of 90 days for filing exceptions so that their executives might have opportunity, after careful study of the situation in the light of the criticism contained in the proposed report, to make any needful corrections. We granted an extension of 30 days.

Effective June 1, 1933, the storage rates, including handling on certain westbound in-transit freight, not only at New York, but at Philadelphia, Baltimore, and Norfolk, were increased to the following basis:

[fol. 113]

	Per 100 pounds
Package or piece property, except wood pulp and crude rubber (free time 5 days), storage:	Cents
Note 1, ¹ for the first 30 days or any fraction thereof.....	5
For each succeeding 15 days or any fraction thereof.....	1.5
Note 2, ² for the first 30 days or any fraction thereof.....	8
For each succeeding 15 days or any fraction thereof.....	3
In bulk, except iron, manganese, barytes ore, chrome ore, and pig iron (free time 5 days) storage:	
Note 1, ¹ for the first 30 days or any fraction thereof.....	5
For each succeeding 15 days or any fraction thereof.....	1.5
Note 2, ² for the first 30 days or any fraction thereof.....	8
For each succeeding 15 days or any fraction thereof.....	3

¹ Note 1: On traffic with a minimum weight in the official classification of 24,000 pounds or higher.

² Including handling into and out of storage.

² Note 2: On traffic with a minimum weight in the official classification lower than 24,000 pounds.

No increases in the rates for storage and handling of crude rubber and wood pulp were made, but on the contrary subsequent to the date of the hearing and prior to June 1, 1933, the transit period was extended on crude rubber and paraffine from 12 to 24 months and from 12 to 18 months on various commodities including burlap, pig tin, cocoa beans, and pepper. It has been shown herein that large quantities of crude rubber have been held in storage at New York at heavy expense to respondents.

Effective the same date the rates at New York on self-propelling vehicles, not boxed or crated, were increased from the regular east-bound in-transit rates (based on weight) to the following basis:

	Per vehicle
If wheel base is 100 inches or less: For each 10 days or fraction thereof.....	\$2.00
If wheel base is over 100 inches: For each 10 days or fraction thereof.....	3.00

Storage of automobiles under this rule will not include insurance, which must be provided by the owners of the freight at their expense, these companies being liable only as warehousemen.

Summary and Conclusions

Certain of the complaining warehouse interests contend that the trunk-line respondents have not been authorized, in their charters, to perform commercial warehousing and storage, and that they are engaging in unauthorized and unlawful commercial warehousing and storage, which they contend is a trade activity not embraced in common-carrier duties. They urge that we should by order bar the carriers from directly or indirectly engaging in commercial warehousing or storage in competition with private-warehouse companies.

The term "transportation" as used in section 1 (3) of the act includes the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. Under section 1 (4) it is made the duty of every common carrier subject [fol. 114] to the act engaged in the transportation of property to provide and furnish such transportation upon reasonable request therefor. While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal. *State v. Southern Pacific Company*, 52 La. Ann. 1882; 28 So., 372; *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169. It is clear that much of the storage service described of record is not such as the carriers are required by the act to furnish. Assuming, without deciding, that carriers by railroad subject to the act may not lawfully furnish, directly or indirectly, storage service which is not within their duties as common carriers, leaves the question as to what, if any, action we may properly take in the premises.

The Commission is a creature of statute, and its authority is derived from the act creating it. *New England Divisions*, 62 I. C. C. 513, affirmed, *New England Divisions Case*, 261 U. S. 184. Its jurisdiction is strictly statutory,

and cannot be extended by implication over other subjects than those which the act defines. In *Re Express Companies*, 1 I. C. C. 349. The function and jurisdiction of the Commission is the regulation of commerce and not the regulation of railroads, except insofar as they are instruments of commerce. *Philadelphia & R. Ry. Co. v. United States*, 219 Fed. 988. The application of the act and the jurisdiction of the Commission cannot be limited or expanded by the provisions of a carrier's charter. *State of Colorado v. United States*, 271 U. S. 153. The Commission does not have jurisdiction to determine whether or not action by a carrier was ultra vires. *Jaloff v. Spokane, P. & S. Ry. Co.*, 152 I. C. C. 758. Compare *Certain-teed Products Corp. v. C. R. I. & P. Ry. Co.*, 68 I. C. C. 260. We have been unable to find any provision of the statutes conferring jurisdiction upon us to require a railroad to cease engaging in a business or activity not within its duty as a common carrier of interstate or foreign commerce. If such power exists, it must rest with the courts or with public bodies other than the Commission. This view, however, is confined to the bare question of authority to deal with activities, as such, which are not within and do not affect the railroad's duty as a common carrier.

A different situation is presented where the performance of such services is so related to the performance of common-carrier duties and of such character as to create a violation of the act, because it is established that in such circumstances the Commission is vested with ample authority. *Merchant Warehouse Co. v. United States*, 283 U. S. [fol. 115] 501. It follows that we have authority to require the carriers to cease engaging in the commercial warehouse business, in cases where it is shown that the business is of such a nature that its conduct by the carrier necessarily results in violations of the law administered by the Commission. This conclusion necessitates consideration of various features of the warehousing performed by the respondents at New York as related to their common-carrier services performed subject to the provisions of the Interstate Commerce Act and related acts.

As stated above, much of the warehousing or storage service under consideration here and the handling necessary in connection therewith is not storage incidental to transportation but is commercial storage. Compare *Mer-*

chants Warehouse Co. v. United States, 44 Fed. (2d) 379, affirmed 283 U. S. 501.

Storage in transit permits the stopping of goods at an intermediate point en route and the reshipping therefrom to final destination at the through rate instead of the higher combination of local rates, to and from the transit point, which would obtain if the transit privilege was not granted. The transit privilege ordinarily is for the purpose of permitting some milling, manufacturing, or other trade process to be performed to the goods during the transit period.

Each of the seven trunk-line respondents provide transit rules and rates for the storage of westbound freight at their warehouses in the Port of New York district, but these rules and rates vary greatly from the generally accepted storage-in-transit practices in the following particulars. The owners of the stored freight may, and oftentimes do, sell it locally, remove it by trucks or other means, withdraw it from consumption at any time or in any quantity by means suiting their business needs or inclination. Furthermore, if the goods remain in storage beyond the time limit imposed for in-transit storage the rates for storage remain the same as applied during such period. In the particulars named the storage partakes of the nature of commercial storage, and the storage involved is not, properly speaking, in-transit storage. The fact that it is designated as such in the carriers' tariffs does not invest it with the characteristics of in-transit storage.

The motive of the carriers in engaging in the commercial business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. Those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit. The rail carriers directly or through dominated and controlled subsidiaries seek out the larger shippers and offer them lower rates for warehousing services and ware- [fol. 116] house space than the private warehousemen. It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation.

The conflict of interests is not confined to rail carriers and private warehousemen, but concerns also the rail carriers as between themselves. The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business. The conflict of interest applies also as between larger shippers, controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses. It should be borne in mind that certain carrier-controlled warehousing facilities are not available to the general public, but only to selected concerns controlling large volumes of traffic. The tariffs provide that arrangements for storage space for westbound shipments in or on railroad piers or warehouses must be made in advance with respondents, or with outside warehouses if stored therein.

We cannot sustain the view that freight rates and storage or warehousing charges are not to be considered together because the warehousing services are in some instances conducted by separate corporations or companies. The record clearly shows that the interests of the carriers in those corporations or companies extend to complete an active domination and control. The substance and not the mere form of the relations should govern. *Chicago, M. & St. P. R. Co. v. Minneapolis, C. & C. Assn.*, 247 U. S. 490, 501, *Southern Pacific Term Co. v. Interstate Commerce Commission*, 219 U. S. 498. In the former case the Supreme Court said:

Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent of representative between the two. [*Pullman's Palace Car Co. v. Missouri P. R. Co.*, 115 U. S. 587, 29 L. Ed. 499, 6 Sup. Ct. Rep. 194; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 391, 51 L. Ed. 841, 852, 27 Sup. Ct. Rep. 513; *United States ex rel. Atty. Gen. v. Delaware*

& H. Co., 213 U. S. 366, 413, 53 L. Ed. 836, 851, 29 Sup. Ct. Rep. 527; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 108, 54 L. Ed. 112, 114, 30 Sup. Ct. Rep. 66; and *United States v. Delaware, L. & W. R. Co.*, 238 (501) U. S. 516, 529, 530, 59 L. Ed. 1438, 1443, 1444, 35 Sup. Ct. Rep. 873]; and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the [fol. 117] stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation, and to render valueless its capital stock owned by the Milwaukee and Omaha companies.

While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 273, 55 L. Ed. 458, 463, 31 Sup. Ct. Rep. 387, and *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct. Rep. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

In addition to furnishing warehousing services the rail carriers, or their subsidiaries, also rent space in stations, piers, or warehouse buildings to certain shippers for various purposes, and the rental exacted is not only below the prevailing rates but is noncompensatory. This is illustrated by the Erie lease from the city of New York of Pier 67, with the adjoining water rights, at an annual cost, including incidental expenses, of \$58,542, where the pier space was subsequently subleased to the Willys Overland Company for \$500 monthly. The Lackawanna lease to the Quaker Oats Company of space on Pier 41 is an example of securing competitive traffic by the offer of non-compensatory rental.

In *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, we said:

No justification exists for the leasing of railway lands to industries at a nominal rental charge. In cases where nominal or wholly inadequate rentals are reserved in leases it is evident, and indeed conceded, that traffic considerations are the moving cause so far as the carriers are concerned. Where it clearly appears that the traffic of the lessee is in part the consideration for the lease, the conclusion follows almost inevitably that the transaction amounts to a concession to the shipper-lessee; in violation of the Elkins Act and of sections 2 and 6 of the Interstate Commerce Act.

Certain of the carriers load and unload carload traffic, or make allowances to cover the cost of such loading and unloading for certain shippers, under tariffs or exceptions to the classification. This is contrary to the general practice with respect to carload traffic and to the provisions of the consolidated freight classification. An illustration of this character is the allowance made by the New York Central to the Auto Storage Company and the Mellish Company for unloading automobiles, including removal of material used in stowing the automobiles in the car. When carriers by their tariffs extend their service beyond their legal obligation as common carriers, as, for example, beyond a delivery equivalent to team-track delivery, we have ordinarily found that such extra service must be paid for by the shipper in order to avoid preference and prejudice. *General Electric Co. v. N. Y. C. & H. R. R.*, 14 I. C. C. 237; *Pressed Steel Car Co. v. Director General*, 93 I. C. C. 224, 109 I. C. C. 75; *Carnegie Steel Co. v. Director General*, 96 I. C. C. 527, 132 I. C. C. 689.

It is also the general practice of the respondents⁹ to assume liability for actual loss or damage by fire, not to exceed the declared value, at a rate of 8 cents per \$100 of value per annum. This is much below the rates ordinarily prevailing for such insurance, and in instances where the carriers reinsure they are compelled to pay a higher rate and bear the difference. The detailed facts as to these practices have previously been set forth.

Although the carriers charge all shippers alike the tariff rates for rail transportation, it is obvious that the according

⁹ Except the Central Railroad Company of New Jersey.

of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited by section 2 of the act. It is likewise clear that the shippers receiving the benefit of such non-compensatory charges are given undue preference or advantage in violation of section 3. (1) of the act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefits. These violations are added to in some cases by the free loading and unloading of carload freight, or payment of allowances therefor, and the handling of freight into and out of storage at less than compensatory rates. The fundamental purpose of the act is to require fair and equal treatment of shippers, "to compel the carriers as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality", and to "place all shippers upon equal terms." *New York, N. H. & H. R. Co. v. Interstate Comm. Com.*, 200 U. S. 361; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467; *United States v. Union Stock Yards*, 226 U. S. 286. Carriers subject to the act cannot lawfully accomplish violations of these sections by resorting to separate corporations which they dominate and direct. *United States v. Lehigh Valley R. Co.*, 220 U. S. 257; *Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Assn.*, *supra*, *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516. Nor can such violations be justified by reason of existing contracts. *United States v. Union Stock Yards*, *supra*; *Louisville & Nashville R. Co. v. Mottley*, *supra*.

[fol. 119] These practices lead also to violations of section 6(7) of the Interstate Commerce Act.

The evidence of record also affords reasonable ground for the belief that the carriers have violated and are violating the provisions of the Elkins Act.

The private warehouse companies are "persons" within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the charges which they are required to pay and the treatment they are accorded by carriers subject to the act are subject to the provisions of these sections, as well as the provisions of the Elkins Act.

Compare *Merchants Warehouse Co. v. United States*, supra. As shippers they are to be dealt with in accordance with the provisions of the act. It is of course recognized that the rail carriers are under no obligation to place their charges for warehousing services on a basis which will insure a profit to private warehouses if their charges meet the provisions of the statutes. Compare *Amer. Warehousemen's Assn. v. Inland Waterways Corp.*, 188 I. C. C. 13. But regardless of the effect upon private warehouses the carriers are bound to comply with the law even though such compliance necessitates changes in rates and practices that were designed to attract traffic to their facilities. The present rates and practices of the rail carriers, as considered herein, cannot be justified upon the ground that the aggregate charges are not unreasonable as not all shippers are accorded the same aggregate charges for like and contemporaneous services.

The situation here presented is analogous to that considered by the Supreme Court in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, supra. The question to be decided in that case, as stated by the court, was "has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold when the price stipulated in the contract does not pay the cost of the purchase, the cost of delivery, and the published freight rates?" In reaching a negative decision upon this question the court said:

Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied, and be given their lawful effect. Even therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

[fol. 20] The above question, as stated by the court, can properly be paraphrased to cover the situation here pre-

sented, as follows: Has a carrier engaged in transporting commodities in interstate commerce the power to furnish directly or indirectly storage or warehousing facilities not within its common-carrier duty and to act as a private or commercial warehouseman when the amounts received from such storage and transportation are not sufficient to pay the cost of such storage without a concession from the published freight rates? This question clearly must be answered in the negative, and it follows that if respondents are to continue engaging in such business their charges directly or indirectly for storage or warehousing, and for privileges or services rendered in connection therewith, must be put on a basis which, entirely independent of freight rates, will reimburse respondents for the full costs of such services.

Competitive Waste

Apart from the requirements of the statutes previously discussed, the competitive waste involved in the practices dealt with herein is deserving of most careful consideration. These practices are similar to those considered in Duplication of Product Terminals, 188 I. C. C. 323, wherein we directed attention to the statement in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 585, as follows:

The record shows that in the past decade the railroads have made great strides in improving their service and at the same time operating with greater efficiency and economy. But what they have done in this direction has largely followed lines which developed under conditions different from those which now prevail, and it has been characterized by a continual intensifying of their own competition. At a time when as an industry they have new enemies to face, their warfare with each other has grown more bitter, so that economies in operation have been offset in part by the growth of competitive waste.

All this is contrary to the spirit of the transportation act, 1920. Congress then looked beyond the individual railroad to the concept of a national transportation system. It pointed the way in the consolidation provision to the reduction of competitive wastes. It went to the extreme of removing the barriers of restrictive Federal and State anti-trust legislation which might otherwise stand in the way.

Short of consolidations, it opened wide the door to agreements for the pooling of service and of revenue, whenever it could be shown to our satisfaction that such agreements were in the public interest. Much has been accomplished in the way of unification, but much remains to be done, and the pooling provisions of the law stand almost unused. Further progress along the lines pointed out by Congress will aid in bringing about the cooperation which is essential to railroad salvation. But the problem cannot wholly be solved in this way, nor is there need that cooperation should be subordinated to the consolidation program.

In our report covering Duplication of Produce Terminals, *supra*, we further stated:

[fol. 121] The matters and transactions which have been described above are illustrations, out of many which might be given, of the serious wastes which often result from intense competition of railroads with each other for traffic. It is believed that such wastes can, by proper cooperation, be avoided or at least minimized.

In that report we referred to a statement addressed by the railroads "To the American Public" and issued on July 21, 1932, in which it was stated that the railroads "pledged themselves to avoid all preventable wastes in the competitive relationship between themselves."

The matters and transactions referred to in this report are further illustrations of serious waste resulting from the competition of railroads with each other for traffic. The extent thereof is indicated by the statements contained in appendixes I to III. By referring to appendix I it will be noted that seven of the carriers have expended over \$36,000,000 in connection with the warehouse projects considered herein, and appendix II shows the loss incurred thereon during 1931 was over \$1,260,441. Appendix III shows the loss per ton of freight stored in-transit ranges from \$1.28 to \$6.18. These losses are added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. The private warehouse interests estimate the total annual losses to be \$3,152,119.63.

It seems unnecessary to dwell at length upon the development and results of the situation here presented. The evi-

dence clearly shows that the carriers themselves are fully aware of the situation. Whether or not initial advantages may have been realized at one time or another, by individual carriers, the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.

We find that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest. Respondents are admonished to take prompt corrective action. This action should not be construed to mean that in the meantime we shall not institute proceedings under the Elkins Act.

For the present, the pending motion to extend this investigation to cover other ports and terminals, is denied. All carriers subject to the act are hereby admonished that their practices and charges should be adjusted in conformity with the principles announced in this report. Failure of the carriers so to adjust their practices and charges should be deemed sufficient reason for the institution of further investigations in conformity with the pending motion.

[fol. 122]

Appendix I

The following table shows the total value and the various respondents' financial interest or outlay in the warehouse projects of record (Port of New York district):

Carrier and warehouse	Location	Total value	Value of railroad outlay
B. & O. R. R. Co.:			
B. & O. 26th St. Stores, Inc.	26th St., Manhattan, N. Y.	\$812,876	\$812,876
C. R. R. of N. J.:			
Newark Warehouse Co.	Newark, N. J.	1,328,302	1,328,302
D., L. & W. R. R. Co.:			
Lackawanna Terminal Warehouses, Inc.	Jersey City, N. J.	9,199,062	9,199,062
Erie R. R. Co.:			
Tooker Warehouse	28th St., Manhattan, N. Y.	446,580	446,580
Standard Milling Co.	Jersey City, N. J.	782,000	782,000
Seaboard Terminal and Refrigeration Co.	do.	5,963,825	849,783
L. V. R. R. Co.:			
Bronx Warehouse	Bronx, N. Y.	1,419,631	1,419,631
Starret Lehigh Bldg.	27th St., Manhattan, N. Y.	6,396,953	6,396,953
National Storage Co.	Black Tom, Jersey City, N. J.	Unknown	Unknown
N. Y. C. R. R. Co.:			
St. John's Park Warehouse	Manhattan, N. Y.	3,277,162	3,277,162
Kingsbridge Warehouse	W. 230th St., Bronx, N. Y.	1,196,409	1,196,409
Rossmore Stores	W. 50th St., Manhattan, N. Y.	625,527	625,527
Old Sheep House	W. 60th St., Manhattan, N. Y.	664,908	664,908
Freight House	Port Morris, N. Y.	160,196	160,196
Hillman Bldg.	do.	58,541	58,541
Pier 99 N. R., city of N. Y.	Manhattan, N. Y.	50,610	50,610
Pier 4 E. R., city of N. Y.	do.	13,585	13,585
United States Cold Storage Corporation	do.	2,215,620	2,215,620
P. R. R.:			
Pennsylvania Dock and Warehouse Co.	Jersey City, N. J.	11,277,200	5,248,000
Total		45,888,987	34,745,745

¹D., L. & W. assigns \$5,035,275.05 to warehouse and \$4,163,787.04 to freight station; the correct amount invested in warehouse is \$8,010,543, based on 87.08 percent of space actually used for storage and 12.92 percent to freight station.

²Includes freight station.

Appendix II

The following table shows financial losses sustained by the trunk-line respondents in connection with warehouse and storage for the year 1931:

Carrier	Warehouse	Loss
B. & O. R. R.	B. & O. 26th St. Stores	\$7,440
Do.	American Dock Terminal	92,073
Do.	Pouch Terminal	53,857
Do.	Pier 12, Stapleton	611
C. R. R. of N. J.	Newark Warehouse Co.	52,325
D. L. & W. R. R.	Lackawanna Terminal Warehouses, Inc.	332,218
Erie R. R.	Lorillard Building B.	53,509
Do.	Lorillard Annex	34,684
Do.	Pier 67, East River, city of New York	52,542
Do.	Ault-Wiborg Building	10,815
Do.	Standard Milling Co. Building	72,977
Do.	Tooker Warehouse	19,173
Do.	Seaboard T. & R. Co.	123,809
L. V. R. R.	Bronx Terminal Warehouse	54,131
N. Y. C. R. R.	Linde Warehouse Co.	13,419
Do.	Port Morris Freight House	3,219
Do.	Hillman Building, Port Morris	6,211
Do.	Kingsbridge Auto Storage & Warehouse Co.	119,917
Do.	J. A. Mellich Warehouse Co.	60,346
Do.	Pier 4, East River, city of New York	39,017
Do.	Pier 99, North River, city of New York	8,148
P. R. R.	Pennsylvania Dock and Warehouse Co.	50,000
Total		1,260,441

[fol. 123]

Appendix III

The following table shows the loss per ton from freight stored in-transit by the trunk-line respondents during the year 1931 (Port of New York district):

Carrier	Warehouse	Loss per ton
B. & O. R. R.	American Dock Terminal	\$2.48
Do.	Pouch Terminal	2.26
Erie R. R.	Seaboard Terminal	6.18
Do.	Lorillard Building B.	2.06
Do.	Lorillard Annex	1.50
Do.	Standard Milling Warehouse	2.76
Do.	Ault-Wiborg Building	3.24
N. Y. C. R. R.	Mellich Warehouses	3.11
Do.	do	1.63
Do.	Kingsbridge Freight House	1.84
Do.	F. C. Linde Company	1.28

[fol. 124]

EXHIBIT "D" TO PETITION

(Referred to in Paragraph VIII of Petition)

Order

At a Session of the Interstate Commerce Commission, Held
at Its Office in Washington, D. C., on the 6th Day of May,
A. D. 1935

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or
Expenses

Part VI. Warehousing and Storage of Property by Carriers
at Port of New York, N. Y.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, That the above-entitled proceeding be, and it is hereby, reopened for further hearing for the purpose of bringing the record down to date.

It is further ordered, That such further hearing be restricted solely to such warehousing and storage of property as is performed by the respondent Carriers at the Port of New York, N. Y., which for the purposes of this case is defined generally as including all points in the counties of New York, Bronx, Queens, Kings, Richmond and Westchester, in the State of New York, and all points in the [fol. 125] counties of Hudson, Essex, Bergen, Union and Passaic, in the State of New Jersey, as well as the waters appurtenant to said counties.

It is further ordered, That this proceeding be, and it is hereby, assigned for further hearing on June 24, 1935, at 10 o'clock a. m., daylight saving time, at the Hotel Pennsylvania, New York, N. Y., before Director Bartel.

By the Commission.

George McGinty, Secretary. (Seal.)

[fol. 126] EXHIBIT "E" TO PETITION

(Referred to in Paragraph IX of Petition)

Interstate Commerce Commission, Washington

May 6, 1935.

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or
Expenses

Part 6. Warehousing and Storage of Property by Carriers
at the Port of New York, N. Y.

Notice of Information to be Sought at Reopened Hearings

To The Baltimore and Ohio Railroad Company
Brooklyn Eastern District Terminal
Bush Terminal Company
Central Railroad Company of New Jersey

The Delaware, Lackawanna & Western Railroad Com-
pany

Erie Railroad Company
Hoboken Manufacturers Railroad Company
Jay Street Terminal
Lehigh Valley Railroad Company
Long Island Railroad Company

The New York Central Railroad Company
New York Connecting Railroad Company
New York Dock Railway
New York, New Haven & Hartford Railroad Com-
pany

New York, Ontario & Western Railroad Company

The Pennsylvania Railroad Company
Staten Island Rapid Transit Railway Company
West Shore Railroad Company.

[fol. 127] At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of July, 1931, an order instituting on its own motion a proceeding of inquiry and investigation into Practices of Carriers Affecting Operating Revenues or Expenses was

issued and served upon all common carriers by railroad subject to the interstate commerce act.

This part of the general inquiry is directed toward establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, namely, the carriers to which this notice is addressed, hereinafter termed respondents.

Hearings in this matter were held in June, July and August, 1932, and the Commission issued a report thereon on December 12, 1933, 198 I. C. C. 134. By order of May 6, 1935, the proceeding was reopened for further hearing, for the purpose of bringing the record down to date.

This notice is intended to inform respondents of the particular subjects, as nearly as may be, which are under consideration in this part of the general inquiry, so that they may arrange in ample time to furnish the desired information at the hearings to be held on June 24, 1935, at the Hotel Pennsylvania, New York, N. Y., before Director Bartel. These particular subjects, which were outlined in a notice issued January 6, 1932, and served upon the respondent carriers, are as follows:

[fol. 128] (1) All warehousing or storage afforded or performed on or in the lands, piers, buildings, structures, cars and other facilities and equipment, owned, leased, used, held or controlled directly or indirectly by respondents.

(2) The investments, direct or indirect, of respondents in lands, equipment and facilities used, or to be used, for such warehousing and storage or used in part for such warehousing and storage and in part for other purposes, and the return to respondents on such investments.

(3) The return to respondents on investments, direct or indirect, by respondents in the securities of companies engaged, or proposing to engage, in said warehousing and storage.

(4) Loans, advances, labor, services, allowances, compensation and gratuities made or given, directly or indirectly, by respondents to others engaged, or intending to engage, in such warehousing and storage, and the purpose thereof and the return thereon.

(5) The costs and expenses of loading, unloading, handling, transferring, distributing, warehousing and storing freight assumed or borne, directly or indirectly, by respondents in connection with said warehousing and storage.

(6) Rents or other form of compensation, paid directly or indirectly, by respondents for the use of property devoted to such warehousing and storage.

(7) Rents or other form of compensation received, directly or indirectly, by respondents for the use of their property leased or granted to others and devoted to such warehousing and storage.

(8) Storage-in-transit rules and privileges established or granted by respondents.

[fol. 129] (9) Rules, rates, charges and practices involved in said warehousing and storage.

(10) All other practices involved in said storage and warehousing, and all other information which will enable the Commission to determine whether respondents have complied in connection therewith with the various provisions of the Interstate Commerce Act, or other Acts in addition or supplementary thereto.

NOTE.—Where the term “respondents” is used in this notice it should be understood as including, so far as may be necessary or appropriate to the context, all corporations and interests subsidiary to or affiliated with respondents.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 130]

EXHIBIT “F” TO PETITION

(Referred to in Paragraph XI of Petition)

Report of Interstate Commerce Commission, Ex Parte No. 104, Part 6, Practices of Carriers Affecting Operating Revenues or Expenses; Warehousing and Storage of Property by Carriers at the Port of New York, N. Y., 216 I. C. C. 291, decided June 8, 1936, copy attached hereto.

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Submitted October 18, 1935. Decided June 8, 1936

1. Upon further hearing, prior findings, 198 I. C. C. 134, with respect to respondents' warehousing and storage practices, charges assessed therefor, and allowances made in connection therewith in the Port of New York district, affirmed.
2. Certain of respondents' practices in connection with voluntary commercial warehousing found to result in unjust discriminations, undue preferences, unreasonable disadvantages, and departures from their published tariff rates.
3. The storage and handling of goods, and furnishing of insurance under published tariff provisions herein discussed found to be commercial services performed by respondents for shippers at noncompensatory rates and charges, and to result in violation of section 2, 3, and 6 of the Interstate Commerce Act.

William J. Walsh and Glenwood W. Rouse for Interstate Commerce Commission.

R. W. Barrett, Alex H. Elder, Jervis Langdon, Jr., W. J. Larrabee, Thomas P. Healy, A. J. McMahan, Guernsey Orcutt, M. B. Pierce, J. L. Seager, and Charles R. Webber for respondent class I railroads.

H. D. Boynton, John F. Finerty, Abner J. Grossman, and R. A. P. Walker for other railroads.

Charles J. Austin, Julius Henry Cohen, W. H. Connell, Charles Cotterill, A. Lane Cricher, C. B. Cromwell, Charles J. Fagg, George F. Hichborn, John J. Hickey, H. J. Lang, Wilbur LaRoe, Jr., Parker McCollister, Walter W. McCoubrey, C. Milbauer, Charles R. Seal, Kent B. Stiles, H. J. Wagner, A. G. Welsh, and H. W. Wills for complaining warehousemen and other organizations and companies.

Report of the Commission on Further Hearing

By the COMMISSION:

This is an investigation, upon our own motion, into and concerning the practices of carriers by railroad subject to [fol. 132] the Interstate Commerce Act which affect operating revenues or expenses. This part concerns the practices of railroads in the warehousing and storage of property in the Port of New York district. The practices were initially brought to our attention by complaints of warehouse operators, located in that district, that warehouses owned or controlled by the carriers, or in which they have financial interest, were being operated in a manner which precluded the complaining warehouses from obtaining much, if any, of the business, that the complaining warehouses were losing much of their business to carrier or carrier-affiliated warehouses, and that they could no longer meet the competition of such warehouses. In our prior report, 198 I. C. C. 134, 199, we said:

Although the carriers charge all shippers alike the tariff rates for rail transportation, it is obvious that the according of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited by section 2 of the act. It is likewise clear that the shippers receiving the benefit of such noncompensatory charges are given undue preference or advantage in violation of section 3 (1) of the act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefits. These violations are added to in some cases by the free loading and unloading of carload freight, or payment of allowances therefor, and the handling of freight into and out of storage at less than compensatory rates.

At page 200, we said:

These practices lead also to violations of section 6 (7) of the Interstate Commerce Act.

The evidence of record also affords reasonable ground for the belief that the carriers have violated and are violating the provisions of the Elkins Act.

We said at page 196 that much of the warehousing or storage service under consideration, and the handling in connection therewith, was not storage incidental to transportation, but commercial storage, and compared *Merchants Warehouse Co. v. United States*, 44 Fed. (2d) 379, affirmed 283 U. S. 501. We entered no order, but admonished respondents to take prompt corrective action, and stated that our action should not be construed to mean that in the meantime we would not institute proceedings under the Elkins Act. In some cases prosecutions under that act have been instituted, but these have been ineffectual in securing compliance with the principles laid down in the report. For some time it has been apparent that, although respondents recognize the existing evils, they, for one reason or another, have failed to comply with our findings.

By order of May 6, 1935, the case was reopened for further hearing for the purpose of bringing the record down [fol. 133] to date. By notice of information to be sought at the hearing, we advised that the investigation would embrace all of the practices relating generally to the storage and warehousing of property performed by respondent carriers in the Port of New York district. The term respondents as used in the notice included, so far as was necessary or appropriate to the context, all corporations and interests subsidiary to or affiliated with the following carriers: The Baltimore and Ohio Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, the New York Central Railroad Company, the Pennsylvania Railroad Company, Brooklyn Eastern District Terminal, Bush Terminal Railroad Company, Hoboken Manufacturers' Railroad Company, Jay Street Terminal, The New York Connecting Railroad Company, New York Dock Railway, the New York, New Haven and Hartford Railroad Company, New York, Ontario and Western Railway Company, the Staten Island Rapid Transit Railway Company, and West Shore Railroad. The evidence of record was confined to the seven class I carriers,¹ first

¹ The common designations of those carriers, i. e., Baltimore & Ohio, Jersey Central, Lackawanna, Erie, Lehigh Valley, New York Central, and Pennsylvania are generally used in this report.

named, and which with their affiliated or controlled warehousing interests are herein generally referred to collectively as respondents or carriers.

Matters of interest to this group of carriers are usually disposed of by committee action. Various committees, ranging from those of minor traffic and accounting officials to one composed of railroad executives, have considered our prior report. Largely because each carrier reserves the right to take independent action on any matter where it appears to be to its advantage to do so, and because of the failure to secure concerted action on the part of the carriers, such attempts as have been made to comply with the findings in the prior report have been ineffectual.

As shown in the prior report, each of the seven respondent carriers owns or controls warehouses² in which storage and warehousing of property are conducted. The arrangements under which the business is carried on and the manner in which the warehouses are held vary with the individual respondents. In some cases they are owned and the business is conducted directly by the carrier. In other cases separate corporations own the buildings or conduct the business. In discussing such arrangements we said at page 197:

[fol. 134] We cannot sustain the view that freight rates and storage or warehousing charges are not to be considered together because the warehousing services are in some instances conducted by separate corporations or companies. The record clearly shows that the interests of the carriers in those corporations or companies extend to complete an active domination and control. The substance and not the mere form of the relations should govern.

Such changes as have been made since that time in the management and ownership of the warehouses, and the manner in which the warehousing and storage thereat is carried on, lead us to the conclusion that, with the exception of some facilities formerly, but no longer, leased by certain carriers, all of the warehouses considered in the prior report are in some form or other dominated and controlled by the

² Each of the respondents owns or controls piers in which warehouse activities are also conducted, and the general term "warehouse" as used herein will be understood as including piers.

individual respondents, and, because of the existing relationships, such respondents must be held responsible for any violations of the act which occur through the operation of the warehousing facilities.

Respondents' Commercial Warehousing Activities

We shall deal first with warehousing operations of the respondents, carried on through railroad departments, subsidiary companies, or affiliated companies, which are in all respects voluntary warehousing activities, such as "are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangement and dealing with patrons of warehouses." Prior report, page 139.

In most cases respondents utilize certain space in their owned or affiliated warehouses, in which storage, and services incidental thereto, is provided by them or their subsidiary companies. Other space is rented to shippers for the storing, manufacturing, blending, processing, packaging, or distribution of their goods. Storage in some of these warehouses, as provided for in so-called storage-in-transit tariffs, is also conducted by the respondents, but such storage is mentioned only incidentally in this section of the report, and the practices relating thereto are later fully discussed.

In the prior report we said at pages 138-139:

At New York respondents now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies. * * * In the variety of such arrangements the result is always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purposes railroad management may have in mind.

Beginning at page 144 these matters are dealt with more fully in connection with each of the seven respondents. On pages 196 and 197 we said:

[fol. 135] The motive of the carriers in engaging in the commercial business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. Those engaged solely in the ware-

housing business must depend entirely upon that business for revenue and profit. The rail carriers directly or through dominated and controlled subsidiaries seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen. It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation.

In appendix I to the prior report the value of railroad outlay in the warehouse projects in the Port of New York district is shown to approximate \$35,000,000, and in appendix II the financial loss sustained by the respondents in connection with warehousing and storage for the year 1931, is shown as having exceeded \$1,260,000.

While some changes in the practices and charges were made before and subsequent to the issuance of the prior report, most of the practices and charges therein condemned have not been corrected. The present practices and charges, as later shown, result in heavy losses not only to respondents, but also to competitive commercial warehouse companies. There is not enough business to fill all of the warehouses in the Port of New York district. At the time of the further hearing at least 22 warehouse companies operated cold-storage warehouses in that district. Up to the close of the year 1930, the cold-storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in that district, and within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market. This was an increase of about 25 per cent over the amount of space that had been put on the market by all of the public warehouses in that district during the preceding period of 50 years or more. At the time these two warehouses were opened for operation there was an unused occupancy of at least 30 per cent of the then existing facilities, and at the time of the further hearing there was less than a 50-per cent occupancy. This excess capacity and resulting competition have reduced the cold-storage warehouse rates for handling and storage to sub-normal levels. At the time of the further hearing at least 43 warehouse companies operated merchandise warehouses,

other than cold storage, in the Port of New York district. During a period of 70 years up to that time, these warehouse companies had placed 20,450,000 square feet of warehouse space on the market in that district, and within six [fol. 136] years subsequent to January 1, 1929, the respondents or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 per cent. The record indicates that because of insufficient prospective earnings, it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds.

Because of the competition it is difficult, if not impossible, to adhere to any fixed standard of rates for storage or the rental of space. Concessions are made to prospective tenants or shippers in order to induce them to rent or occupy warehousing space. In some cases this occurs through the granting of free occupancy of space for a period of time before rent is charged. In other cases price reductions are made on storage, handling, and rentals; while in still other cases extensive alterations are made in the space rented in order to suit the particular needs of the business in which the shipper-tenant engages. The record warrants the conclusion that it would be impracticable, if not impossible, for respondents to engage in commercial warehousing without indulging in such practices.

Numerous warehouse operators and associations composed of individuals engaged in various branches of warehousing appeared and were heard at both hearings in this case. The evidence adduced by such operators at the first hearing is summarized in the prior report, at page 189. Cumulative evidence, discussion of which is unnecessary, was given at the later hearing. At page 190, we said:

Complainants offered testimony and exhibits, neither of which was refuted by respondents, which show that they have lost business in practically every form of warehousing to the respondents' affiliated warehouse and storage companies. They claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider trade activities and not common-carrier service.

At page 200 we also stated that the private warehouse companies are "persons" within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act. The provisions of section 3 have been amended since that report was issued and now specifically include "associations" as being within the protection of that section. The contentions of the complaining warehousemen with respect to violations of the act should be borne in mind in considering the results brought about by the practices of respondents in connection with voluntary warehousing. These contentions are set forth in the prior report at page 139, as follows:

The warehouse interests generally are in accord in contending that respondents' storage rates are unduly low, and that thereby certain violations of law are brought about. The Warehousemen's Protective Committee, and those associated therewith, take the further position that the respondents are engaging in unauthorized and unlawful commercial warehousing, which they contend is a trade activity not embraced in common-carrier duty, and insist that the carriers should by our order be barred from directly or indirectly carrying on any commercial warehousing or storage business in competition with private warehouse companies. They feel that in a field of business requiring both transportation and storage of freight, the former should be performed by common carriers, and the latter, which they regard as commercial, by private interests.

The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charges for the two services. It is urged that if a railroad affords such warehousing and storage at unduly low rates as an inducement to the routing of traffic via its line, it subjects the independent warehouse companies to unfair competition.

Although the complaint originally seemed directed to the measure of the charges made by the carriers for their warehousing services, and a great deal of evidence was offered by private warehousing interests going to that matter, it was emphasized at the hearing that the real intent and purpose of the complaining warehousemen is to get the carriers entirely out of the warehousing business.

Baltimore and Ohio Railroad Company

The record on further hearing indicates that there has been no change with respect to the pier operations of the Baltimore & Ohio which are described in the prior report at page 150, and that the Baltimore & Ohio is still leasing space at the American Dock Stores and Pouch Terminal Stores, located on Staten Island, described in the prior report at page 148. Approximately 60,000* and 126,000 square feet of space, respectively, are leased at these warehouses at an annual rental of 45 cents per square foot. The amount of space may be increased or decreased as the needs of the carrier require. This space is used for storage of commodities under so-called storage-in-transit tariffs. At present the commodities stored consist almost entirely of crude rubber. As shown in appendixes II and III to the prior report, heavy losses were incurred in connection with storage and handling at these warehouses, and similar losses continue. At present the total expense in connection with the traffic handled into the warehouses, stored for one year, and handled outbound, amounts to \$7.06 per ton. The revenue collected for such service, including inbound lighterage, amounts to \$2.53 per ton, resulting in a loss of \$4.53 per ton. Such loss is absorbed by the Baltimore & Ohio out of its line-haul revenues, and is given consideration in later sections of this report where the storage of eastbound and westbound carload freight, insurance, and related matters are discussed in connection with all respondents.

Baltimore & Ohio Stores, Incorporated.—The Baltimore & Ohio owns a warehouse building at Twenty-sixth Street [fol. 138] and Eleventh Avenue, New York City, known as its Twenty-sixth Street stores, and leases pier 21, East River, from the city of New York. The Baltimore & Ohio Stores, Incorporated, hereinafter called the stores company, has leased space from the Baltimore & Ohio in the building and at the pier for many years, in which to conduct a general warehouse business. We described the operations of the stores company, a subsidiary of the Baltimore & Ohio, in the prior report at page 144. The stores company is responsive to, and under the direction and control of, the Baltimore & Ohio. It is an adjunct of the railroad's traffic department, and, while separately incorporated, since we must consider the substance and not the form, we regard it as a part of the Baltimore & Ohio. At the time of the further

hearing, 199,000 square feet of space were leased in the Twenty-sixth Street stores, of which 68,000 square feet were subleased by the stores company to other tenants for the conduct of their various lines of business at annual rates ranging from 40 to 72 cents per square foot. The stores company leased on the second floor of the pier 37,000 square feet, of which 4,000 were subleased to tenants at an annual rental rate of 60 cents per square foot. The stores company conducts a general warehousing business in the space not subleased, and performs all incidental services ordinarily performed by public warehousing operations of the Baltimore & Ohio as conducted in its Twenty-sixth Street stores.

Most of the commodities stored in this warehouse are shipped over the Baltimore & Ohio in interstate commerce. In some instances the stores company pays the freight charges on shipments consigned in care of the stores company, arriving collect, and later collects them from the consignee. In other cases, money advances are made to shippers for payment of charges for trucking or similar incidental services, for which a commission is charged. Labeling, sorting, and marking of commodities are performed at a charge. Some pool cars are handled. This practice is later fully discussed in connection with the Lackawanna.

The evidence with reference to the Baltimore & Ohio warehouse operations taken as a whole indicates that for a number of years after the incorporation of the predecessor of the stores company in 1914, the latter's operating practices, while conducted with a view to attracting traffic to the Baltimore & Ohio, did not differ materially from the practices of warehouse operators in general in the Port of New York district. As then conducted they seem to have resulted in some profit, and there are grounds for belief that the operations would have remained profitable had those practices been continued. However, upon the entrance of other respondents into the commercial warehousing field in the Port [fol. 139] of New York district on a much larger scale than those of the stores company, competition for commercial warehousing business became increasingly bitter. After that time the traffic department of the Baltimore & Ohio dominated the management of the stores company. Exhibits of record, particularly letters found in the files of the Baltimore & Ohio, show the struggle of the management of

the stores company to continue to operate the warehouse at rates which would permit it to carry its own burden, but that the desire of the traffic department to secure business for the Baltimore & Ohio resulted in the forcing of warehouse rates and charges to unprofitable levels, leaving the Baltimore & Ohio to assume the burden of the warehouse operations. In this connection it should be borne in mind that while the carriers attribute much of the loss which they bear through warehousing operations to the depression, which began in the latter part of 1929, and increased in severity during the following years, it was pointed out by the manager of the stores company before the beginning of the depression that the engagement by carriers in the warehousing business under conditions disclosed by this record must inevitably result in severe losses to them, and in violation of provisions of the Interstate Commerce Act.

In January 1929 the freight-traffic manager of the Baltimore & Ohio suggested to the manager of the stores company an adjustment of "rents downward for present warehouse patrons so as to retain and at the same time go after business, and between the two, realize greater earnings by using our warehouses to greater capacity". This suggestion appears to have been followed, notwithstanding the objection of the warehouse manager, who advised that he found from monthly reports of members of the Warehousemen's Association of the Port of New York that the percentage of occupancy of the stores-company warehouse was "fully as good as any of them are enjoying, and much better than some"; that it fully "held its own against the fiercest sort of competition"; that "there is a gradual wiping away of railway net earnings not alone due to inadequate rates, but to needless losses running into millions monthly that the traffic men initiate and maintain"; and that if new warehouses then being built "make compensatory rates, we have nothing to worry about; if not, they are apt to get into trouble". A few days later the warehouse manager advised the president of the stores company, who was also a Baltimore & Ohio official, that the traffic men "keep establishing more and more bad precedents year after year by giving free services and services at nominal costs or at ruinous rates, which, in the aggregate, run into many millions"; that "once inaugurated, there is great difficulty in doing away with them"; and that "the

rival lines, to meet these conditions, are apt to go them one better and still further magnify the losses".

[fol. 140] In September 1929 the manager of the stores company advised the president by letter that "railroads . . . have all been insanely jealous of us and have the idea that we are doing a very much larger business on a very much more profitable basis and getting more freight haul out of it than is actually the case". With reference to the warehouse of the Pennsylvania Dock & Warehouse Company, now the Harborside Warehouse Company, he further stated:

I notice that the P. R. R., which promised to throw their business to them and have taken some of their securities and doubtless have leased the ground to them on favorable terms, do not stand behind any of these advertising issues with any sort of a guarantee, in which they are quite wise. This is the most promising, however, of all of the projections now under way here, because it has splendid water facilities with ample dock space for large vessels and may injure the Brooklyn terminals very severely. The big building of the Erie is about completed, but so far their competition has not been felt. The new Lackawanna terminal, which is still larger, will not be ready for occupancy until late next spring. I cannot understand why these people went into this project, for they are building it with their own money and not with any assistance from the outside public. They have consulted with me a number of times on structural problems, and I have always sought to discourage them as to the possibilities of any profits.

In November 1929 the manager of the stores company advised the statistician of the Baltimore & Ohio that—

. . . business looks more hopeful to me. There has been plenty of it right along, yet we have lost money for the past three years due to the fact that the trunk lines here have engaged in a foolish war among themselves, which has greatly interfered with our business. Under various subterfuges—store-door delivery, drayage in lieu of lighterage, constructive stations, etc.—they have been snatching the business from our reach by performing expensive, high-class services that are properly the function of a storage warehouseman. They have been doing this free or at purely nominal rates.

In May 1930 the manager of the stores company, in speaking of a representative of the National Cash Register Company, a tenant of the stores company, advised its president:

* * * He stated that he could effect a saving of nearly \$6,000 a year by accepting the D. L. & W.'s proposals. He said that about one-third of this would be a saving in rental, and the other two-thirds in cartage as the D. L. & W. have a motor trucking company, which they control, which made rates for delivering about one-half what he was paying over here. * * * He refused to state what the rates of the D. L. & W. were, nor would he intimidate [sic] what his ideas were in regard to rental we should charge and said he wanted a proposition from us. I submitted a memorandum in writing the next day to Mr. Richardson [freight traffic manager of the B. & O.] whereby we agreed to reduce the rent, effective May 1st, from 6½¢ per square foot per month to 5¢. This is a reduction of 23%. In the beginning we had agreed to give him two (2) locations adjacent to the elevator on the platform free of charge to enable him to make separations and to assemble goods for immediate export or local delivery. As time went on, they con-[fol. 141] siderably exceeded this limit and occupied for the most part four (4) bays of our most precious space, and there have been times when they have exceeded this. They are the only tenant in the house that enjoys this privilege.

In June 1930 the manager of the stores company advised its president:

I have been trying for some time to get the business of the General Motors Radio Corporation, which originates in Dayton and at present is stored at the Bush Terminal. I was informed that they were going to change and that the D. L. & W. people had solicited them strongly, stating that they did not aim to make any profit on their storage business, and, in fact, the rates they quoted would net them a large loss. This is one very truthful statement. I quoted him our rates, which he said were higher than the D. L. & W.'s, although I had cut them as far as seemed prudent. Their Agent said the D. L. & W. rates were better * * *

We have published no tariff since 1921. This was a very carefully prepared one with the rates figured out to give the same yield per square foot on all commodities alike

and based on a gross earning capacity of $7\frac{1}{2}\%$ per square foot. We have a number of copies left, but I keep them closely filed in a drawer and do not give them out to the public, for the reason that it gives our competitors a target to shoot at. Whenever possible, I try to obtain these rates, but under present conditions we have not been able to do so and our statements show that we are carrying on our business at a loss, whereas the volume of it is sufficient to yield a fair profit. I handed copies of this tariff as affording a safe guide for rate making purposes to Mr. Nat Duke, Vice President of the D. L. & W.

° In December 1930 the manager of the stores company advised its president:

• • • Business conditions are somewhat bad and our revenues are no better for this time of the year. I am sorry to state, furthermore, that our revenues have shown a considerable reduction. This is due to the low rates at which we are forced to handle goods, and in many instances these rates have been dictated to us by Mr. Richardson's office. By charging at the usual rates, the amount of business we have received this fall would ordinarily have netted us a fair profit on our operations, but we have been asked and have had to accept several accounts at rates that bring us out with a considerable loss. • • • The only thing I ever refused absolutely to take in was the automobiles they tried to get us to accept more than a year ago at ruinous rates. If we had met the figures that were being charged by several railroads in this City, it would have meant handling the automobiles for about 25% of our usual rates, for which we could not possibly attempt to handle the business without losing heavily.

In October 1931 the freight-traffic manager of the Baltimore & Ohio advised the western freight-traffic manager of that line:

Since the Lackawanna put up their warehouse in Hoboken, the P. R. R. in Jersey City and the L. V. interests having a new one under construction in New York, the supply of warehousing facilities have greatly exceeded the demand so that competitive interests who are virtually starving for business with their figures in the "red" are making all sorts of overtures to known regular users of warehouses in this district.

[fol. 142] As indicated by the above and other correspondence not here quoted, but of record, the stores company's warehousing revenues were shrunk by competitive price cutting. The operations became unprofitable and in numerous cases accounts for storage and leased space were taken at rates below the cost of the services. After July 1, 1928, the stores company discontinued paying rental for the space occupied by it on pier 21. Formerly rental amounting to as much as \$10,000 had been paid. In lieu of rent the stores company turned over to the Baltimore & Ohio any profits derived from their operations. The rental paid by the stores company for space in the Twenty-sixth Street building had varied from year to year. In 1930, \$96,000 was paid, in 1931, \$87,000, and in 1932, the amount agreed upon was \$84,000. During 1932, the stores company's operations, not considering the rental for the building, resulted in a net income of \$42,838. This was turned over to the Baltimore & Ohio resulting in a loss to it of \$41,162, the difference between the amount received and the agreed rental.

In 1933, the rent of this space was fixed at \$43,000, in anticipation of the amount which the stores company would be able to pay, and resulted in the stores company's operations showing a profit of \$4,070, which was also turned over to the Baltimore & Ohio. Similar rental arrangements were made in 1934, the profit for that year, amounting to \$5,713, also being turned over to the Baltimore & Ohio.

The prior report shows that a return of 6 per cent on \$812,877, the amount invested by the Baltimore & Ohio at the Twenty-sixth Street building and allocated to warehousing, would yield \$48,772. The record does not indicate the amount taken into account for depreciation but the taxes for the year 1934 were \$18,048.

The record establishes beyond question that the Baltimore & Ohio's traffic department dictated many rates which, when applied by the stores company, resulted in the rental of space and storage of goods at prices which, while they obtained line-haul business for the Baltimore & Ohio, were less than the cost of providing the space or services. In other words, the shipper in those instances obtained a concession in storage which affected and reduced the total cost for transportation and storage of the commodities shipped. The effect of such practices upon persons operating competing warehouses has been previously discussed.

The Baltimore & Ohio, by bearing the losses of the stores company, provides the concession, which consists of the difference between the transportation rate plus the real value of the storage or use of the rented space and the rate at which these are actually furnished. In considering similar practices in New York, *N. H. & H. R. Co. v. Interstate* [fol. 143] Commerce Commission, 200 U. S. 361, hereinafter referred to as the New Haven case, where a carrier collected or received less than its published freight rates by means of dealing in the purchase and sale of coal, the court held that such practices are violative of the act. That case is later herein more fully reviewed.

Summary of Principal Findings of Fact

1. The stores company is a wholly owned and controlled subsidiary of the Baltimore & Ohio. The stores company is an adjunct of the railroad's traffic department, and is in effect a part of the railroad.

2. The Baltimore & Ohio, through the stores company, engages in the commercial warehousing business in competition with other commercial warehouses in the Port of New York district.

3. The Baltimore & Ohio, through the stores company, provides storage for and leases space to certain shippers in interstate commerce at rates and charges which fail to compensate said railroad for its cost in providing said storage and space, thereby assuming a part of the cost of conducting such shippers' commercial operations.

4. The Baltimore & Ohio does not bear any portion of the expense of conducting commercial operations for other shippers for whom it transports freight in interstate commerce, and who store goods and lease space in warehouses which compete with the stores company's warehouse.

We find that by assuming a part of the costs of conducting the commercial operations of certain shippers in interstate commerce, and by providing storage and warehouse space at noncompensatory rates and charges for said shippers, the Baltimore & Ohio reduces below the published tariff rates the transportation charges paid by said shippers, and grants concessions to said shippers to the extent of the difference between the cost to said railroad of providing said storage and space and the amount which it receives therefor.

We further find that by assuming a part of such costs and by granting such concessions the Baltimore & Ohio is guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages in violation of section 3 of said act, and departs from its published tariff rates, in violation of section 6 of said act.

Delaware, Lackawanna and Western Railroad Company

The traffic department of the Lackawanna has at all times dominated the warehousing arrangements of that respondent. The vice president in charge of that department testified that the prior report had never received his consideration and that he had not reviewed the evidence introduced [fol. 144] with respect to the Lackawanna at the former hearing. Under such circumstances it is not to be expected that any material changes would be made in the policies of that respondent since the issuance of that report.

No material changes have been made by the Lackawanna with regard to its control of piers. It continues to use piers, parts of which are leased and other parts used for storage as described in the prior report at pages 171 and 172, and without reviewing that description it should be stated that we found the charges in connection with the leasing of certain space, storage and handling, and insurance of goods, there discussed in detail, were wholly noncompensatory to the Lackawanna. This respondent's insurance, storage under the so-called storage-in-transit tariffs, and similar subjects are dealt with in other sections of this report, and we are here concerned chiefly with its commercial warehousing operations as carried on in its principal warehouse.

Particular mention of the Lackawanna's lease to the Quaker Oats Company of space on pier 41, North River, was made at pages 172 and 198 of the prior report. That lease made at noncompensatory rentals has continued without change to the present time, as shown by the further hearing.

Lackawanna Terminal Warehouses, Incorporated.—This company, hereinafter termed the warehouse company, discussed in the prior report at page 167 et seq., under the heading "Lackawanna Terminal Warehouse Company," is a wholly owned subsidiary of the Lackawanna. The record shows that the railroad's purpose in constructing a ware-

house operated through the warehouse company was to attract traffic to its line in competition with the other trunk lines, and that the incorporation of the warehouse company was in furtherance of that purpose and devised in an attempt to evade certain regulations to which the Lackawanna as a common carrier by rail was and is subject. The manager of the warehouse, who was formerly employed exclusively by the Lackawanna, is furloughed by and retains his pension rights with that railroad. So far as concerns all important matters in connection with the warehouse the manager thereof is subordinate in authority to a warehouse committee composed of five executives of the Lackawanna. The record is conclusive that the interests of the Lackawanna in the warehouse company extends to a complete domination and control thereof, and that the warehouse company is an adjunct of the Lackawanna's traffic department. The substance and not the mere form of relations must govern. Prior report, page 197.

[fol. 145] As shown in the prior report, the Lackawanna erected a building in Jersey City, the lower portion of which is used by it for freight-station facilities. Parts of the upper floors are leased to the warehouse company and the balance is used by the Lackawanna Railroad for storage of in-transit freight later discussed. The cost of the building and freight-terminal facilities was \$9,199,062.09, of which \$5,035,275.05 was assigned to the warehouse. Under the terms of the lease the warehouse company pays an annual rental for the gross space occupied by it on the basis of 22.368 cents per square foot, payments to be made monthly.

The area of the building devoted to warehouse operations is 1,072,883 square feet. For the 35 months from December 1931 to October 1934, inclusive, the average amount of space used by the Lackawanna was 645,940 square feet, and the average amount of space, including all space necessary for aisles, columns, etc., used by the warehouse company was 426,943 square feet. The Lackawanna thus occupied 60.21 per cent of the total space and the warehouse company 39.79 per cent. The warehouse company during this period paid an average monthly rental of \$7,959. From April 4, 1930, to September 30, 1934, the loss, as termed by a Lackawanna witness, "the excess of interest on investment and depreciation over operating income", to the Lackawanna on the portion of the building devoted to warehousing, with interest computed at 5 per cent and depreciation at 2 per cent, was

\$1,391,170.67. This does not include the loss of \$106,000 to the warehouse company from its operations. As is later shown, a compensatory annual rate including a reasonable profit for the net space subleased by the warehouse company would be 60 cents per square foot. The warehouse company holds itself out as willing to lease space at rates from 40 to 50 cents per square foot, but in numerous cases, as later shown, space is rented at much lower rates.

Obviously no independent warehouse could continue to sublease space or store goods at charges below cost. From January 1931, through March 1934, in no instance did the warehouse company make its monthly rental payments when due, the periods allowed to elapse ranging from 1 month and 25 days to 8 months. No payments had been made from April to October 1934, inclusive, and as of November 30, 1934, the amounts due for those months were \$11,414; \$11,208, \$10,910, \$10,624, \$10,754, \$11,106, and \$9,822, respectively, and the total amount in arrears \$75,838. If the warehouse company were an independent corporation competing with other warehouses it would clearly be unlawful for the Lackawanna to subsidize or grant concessions to it through the noncollection of rentals or leasing of space at [fol. 146] noncompensatory rates, or by similar means to bear a portion of the cost of its operation. *Merchants Warehouse Co. v. United States*, supra. The subsidizing of persons engaging in commercial warehousing is later fully discussed in connection with the Central Railroad Company of New Jersey.

The warehouse company holds itself out to perform three classes of service, namely, the renting or leasing of space, general storage, and the handling of pool cars. These services and the advantages offered to shippers by their use are outlined in a memorandum dated September 28, 1933; prepared by the warehouse company at the request of the traffic department of the Lackawanna. The memorandum shows that under the arrangement of renting or leasing of space—

the lessee takes over the required amount of space necessary in which to maintain his office and stock, places his own employees in charge and operates identically in the same manner as he does his own shipping room at the plant or factory, except that the warehouse company provides all handling outside of the leased space, including the unloading of cars, deliveries into the tenant's space and removes assembled

outbound shipments from the space to the railroad or to the tailboard of delivering motor trucks.

Rental charge varies from 40¢ per square foot up to 50¢ depending on the amount of space, location and other facilities desired. Rental charge includes electricity for light. Handling charge 70¢ per ton up.

At the further hearing it was shown that there were about 30 tenants occupying space in the warehouse at rentals ranging from 25 to 60 cents per square foot per year. In 1929 the manager of the warehouse company was advised that, based on what the warehouse earnings should be, a rate of 60 cents per square foot per year should be charged. In 1930, after finding it impossible to secure tenants at this figure, the manager of the warehouse company was authorized to lower the rate to 50 cents per square foot per year. As practically no tenants were secured, further reduction was authorized. Extreme variations in rentals charged on a square-foot basis are shown of record, due it was testified to competition with private warehouses and other railroads; and to the real-estate market. The reason for the higher existing rentals is that they were made on long-term leases in 1930.

In some cases free rent is granted for a period of time at the beginning of the lease term, depending entirely on the desirability of the tenant from a landlord's standpoint, the availability of space, and the amount of traffic which will be diverted to or retained by the Lackawanna.

Numerous leases were made in the early part of 1934 to parties interested in the handling and sale of liquor at annual rentals ranging from 25 cents to 40 cents per square [fol. 147] foot. To some extent the rates were governed by the amount of space occupied. In one instance a rate of 25 cents was provided in the lease to meet the competition of another warehouse which had offered to handle the liquor to and from storage without charge. Variable arrangements and charges for handling of goods to and from the leased space are shown of record. While it was testified by the warehouse manager that the charges are in all cases compensatory, it is clear from all the evidence that reductions are made in such handling charges below a compensatory level in order to obtain business which otherwise might be stored elsewhere.

The willingness of the various respondents to grant concessions in the leasing of space to shippers in interstate commerce who control a large volume of traffic is well illustrated by the leasing of space by the Lackawanna through its affiliated warehouse company to the Kraft-Phenix Cheese Corporation. At the time of the prior report the Kraft company was occupying leased space in the warehouse erected by the Seaboard Terminal & Refrigeration Company, hereinafter termed the Seaboard Company, on land leased from the Erie through two of its subsidiaries. The Erie had leased the four lower floors of this building for its own use. The reason for their nonuse is fully set forth later in connection with our discussion concerning the Erie. Suffice it here to say that the Erie in January 1929 released certain space on the four lower floors of the warehouse to the Seaboard Company for occupancy and use by the Kraft company. The Seaboard Company then leased this space to the Kraft company for a period of five years, with the privilege of renewal for a like term at 32 cents per square foot per annum. The details are later set forth. About September 1933, when the lease was about to expire, traffic officials of the Lackawanna, viewing the desirability of the Kraft company traffic, which was estimated to be about 4,725 cars annually, although it actually amounted to about one-half that figure, undertook to interest the Kraft company in changing its location from the Seaboard Company's warehouse to a warehouse located on the Lackawanna. In this the Lackawanna was successful, and the Kraft company was induced to accept space in the Lackawanna terminal warehouse. However, this warehouse did not have refrigeration facilities necessary in the operations of the Kraft company, and extensive alterations were required to make the space suitable. After ascertaining the needs of the Kraft company the Lackawanna officials estimated that the installation of suitable refrigeration equipment would cost \$13,860, with an annual operating cost to the warehouse company of \$2,643.50, and that alterations and improvements in the space to be occupied would [fol. 148] cost \$42,224. The manager of the warehouse company offered to lease to the Kraft company 80,000 square feet of space, of which 16,000 were to be refrigerated, at a total annual rental of \$25,000, equivalent to 31.25 cents per square foot per annum, for a term of 10 years, and agreed to install and operate the necessary re-

refrigeration equipment, adjust the space to suit the Kraft company, and make such changes in the walls and such further improvements as would be necessary, at the expense of the Kraft company, except that the warehouse company agreed to contribute \$15,000 toward the cost thereof. The warehouse company also agreed to furnish steam for power and electric current for power and light, these two items to be paid for by the Kraft company.

This offer resulted in the Kraft company's leasing 91,831 square feet of space at an annual rental charge of \$27,350, equivalent to 29.94 cents per square foot or less than the offer originally made, and it thus appears that the additional 11,831 square feet, not included in the original offer were rented at a rate of 19.86 cents per square foot annually.

An exhibit of record indicates that the net return to the warehouse company under the proposed lease of 80,000 square feet would be 17.8 cents per square foot per annum. It further shows that a payment of \$13,675 was made to a real-estate organization for its services in securing the Kraft lease, although it clearly appears that the negotiations for the lease were conducted almost entirely by officials in the employ of the Lackawanna. It does not appear that the Kraft company ever paid any portion of the cost for these improvements and alterations. The Lackawanna actually expended \$25,548.52 in making the improvements and alterations. This amount was later charged to the additions and betterments account of the Lackawanna, and the warehouse company paid its contribution of \$15,000 to the Kraft company by waiving the rentals for nearly six months beginning with the effective date of the lease.

The Kraft company through its control of a large volume of traffic, has, since January 1929, been able at all times to obtain space for its operations at rates which are wholly noncompensatory to the railroads' warehouse companies. The granting of concessions by carriers through the leasing of space at rentals less than its fair value is as unlawful as any other form of rebating. *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849; *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292. The fact that a subsidiary corporation is interposed between the Lackawanna and the companies to which such leases are made cannot be held to relieve the Lackawanna from responsibility for violations of the act. Prior report, page 197, and cases cited.

[fol. 149] The second class of service which the warehouse company performs as described in the memorandum previously mentioned, is general storage. This type of business is—

placed by the owner with the warehouse company as custodian. The warehouse company stores the material and performs all labor at a charge per package or per hundred-weight. The owner places all orders for reshipment or may supply the warehouse with a credit list showing the names of their customers who are permitted to order direct from stock. The warehouse company maintains all stock records, selects the materials required, issues shipping papers, marks packages and keeps all inventory and stock reports.

The warehouse company performs a distributing and warehouse service and all the incidental services required on this class of service. When necessary it collects charges on c. o. d. shipments, and when shipments received for storage are consigned to the warehouse and billed collect, it pays the Lackawanna the freight charges within the credit period, and later collects from the shipper or consignee. Ordinarily the warehouse company bills the shipper or consignee for the freight charges, and they are paid in the regular course of business. In some instances they are included in the monthly bills rendered for warehouse services, but in specific cases shown of record, the warehouse company has been unable to collect for periods of several months. In such cases, due to the close relationship between the warehouse company and the railroad, this amounts to a failure on the part of the Lackawanna to collect its freight charges within the usual 96-hour period allowed for such collection.

The manager of the warehouse company testified that in order for the warehouse to continue in business it must engage in a distribution service and perform such miscellaneous services as may be required in connection with the business of its customers. Among such miscellaneous services are the marking and labeling of packages, preparing of invoices and manifests, sometimes the unpacking of crated goods to permit delivery of individual articles, and many other similar incidental services.

In 1929 and 1930, the rate of the warehouse company for general storage on a square-foot basis was 75 cents an-

nally for space occupied. Because of the keen competition this rate was reduced in the latter part of 1930 to 60 cents and in 1932 to 48 cents. Thereafter the rates of the warehouse company were governed by "what the other fellow did". In some instances they were lowered to about 36 cents. Some accounts which had been originally placed in general storage at rates which were compensatory were forced because of competition to noncompensatory levels. In one case a competing warehouse cut rates from 33 to 40 per cent below the rates of the warehouse company, and the latter was compelled to meet such rates in order to retain [fol. 150] the business. In some instances goods were stored at a monthly charge per hundred pounds, and corresponding reductions were made in the charges on that class of business.

The manager of the warehouse company testified that he regarded 48 cents per annum per square foot as a compensatory rate, but that this will not allow any profit. Using that figure it is clear that concessions to shippers are made in the leasing of space and the storage and handling of goods. It is likewise clear that many of the arrangements between the warehousing company and the Lackawanna, on the one hand, and persons whose goods occupy the storage space, on the other, are entered into — a result of bargaining and concessions. Such bargaining and concessions, whether made by the Lackawanna directly, or indirectly through its subsidiary warehouse company, violate sections 2, 3, and 6 of the act.

The third class of business which the traffic department of the Lackawanna holds out as being performed by the warehouse company is the handling of pool cars, described in the memorandum aforementioned, as follows:

Under this arrangement storage is seldom required. The shipper consolidates a sufficient number of consignments for various customers and destinations to insure a carload minimum and consigns them to the warehouse for immediate reforwarding to final destination. Under this arrangement, a concern using either LCL freight or forwarding company service may, in many instances, save the difference between the rate being paid and the lower carload rate. This saving is sufficient in many instances, to pay the cost of warehouse and delivery charges to destination,

in addition to facilitating the time in transit between the factory and the customer's door.

In view of our conclusions that the interest of the Lackawanna in the warehouse company extends to a complete domination and control thereof, and that the warehouse company is merely an adjunct of the Lackawanna's traffic department, no extended discussion of the handling of pool cars is necessary. By rule 23 of the consolidated freight classification a carrier may not distribute carloads of freight in less-than-carload lots, nor assemble less-than-carload lots into carloads. *Merchants Warehouse Co. v. United States*, supra; *Terminal Warehouse Co. v. Pennsylvania R. Co.* decided by the Supreme Court March 2, 1936. Acting through the instrumentality of its subsidiary, the warehouse company, the Lackawanna performs services indirectly which it may not perform directly, and thus departs from the provisions of its tariff.

Summary of Principal Findings of Fact

1. The Lackawanna leases space on pier 41, North River, New York City, to the Quaker Oats Company at rates and charges which fail to compensate said railroad for its cost in providing such space.

[fol. 151] 2. Lackawanna Terminal Warehouses, Incorporated, is a wholly owned and controlled subsidiary of the Lackawanna. The railroad dominates and controls the warehouse company and uses it as an adjunct of its traffic department. The warehouse company is in effect a part of the railroad.

3. The Lackawanna, through its said wholly owned subsidiary warehouse company, engages in the commercial-warehouse business in competition with other commercial warehouses in the Port of New York district.

4. The Lackawanna, through its said wholly owned subsidiary warehouse company, leases and rents warehouse space to shippers in interstate commerce at rates and charges which fail to compensate said railroad for its costs in providing said space.

5. The Lackawanna, through its said wholly owned subsidiary warehouse company, provides free rental of warehouse space for varying periods of time to certain shippers

in interstate commerce. The amount of free rental so provided is dependent upon the bargain made between said shippers and said railroad.

6. The Lackawanna, through its said wholly owned subsidiary warehouse company, handles goods into and out of storage for certain shippers in interstate commerce at less than said railroad's cost of such handling.

7. The Lackawanna, through its said wholly owned subsidiary warehouse company, performs commercial storage of goods in its warehouse for certain shippers in interstate commerce at rates and charges which are less than the cost of providing said storage.

8. The Lackawanna, through its said wholly owned subsidiary warehouse company, distributes in less-than-carload lots shipments transported at carload rates in interstate commerce.

9. The Lackawanna, through the instrumentality of its said wholly owned subsidiary warehouse company, delivers to certain shippers freight transported in interstate commerce, without collecting freight charges on said freight until after the expiration of 96 hours after delivery of the freight.

10. The Lackawanna, through the practices described in connection with the leasing of space, provision of free rental, commercial storage and handling of goods, distribution of carload freight in less-than-carload lots, and failure to collect freight charges within 96 hours after delivery of the freight, assumes a part of the cost of conducting the commercial operations of certain shippers in interstate commerce over its line.

11. The Lackawanna does not bear any portion of the expense of conducting commercial operations for other shippers for whom it transports freight in interstate commerce, [fol. 152] and who store goods and lease space in warehouses which compete with its wholly owned subsidiary warehouse company.

We find that by assuming part of the cost of conducting the commercial operations of certain shippers in interstate commerce, by providing commercial storage, services inci-

dent thereto, and warehouse space at noncompensatory rates and charges, and by following other practices described herein the Lackawanna reduces below the published tariff rates the transportation charges paid by said shippers, and grants other unlawful concessions to said shippers.

We further find that by assuming a part of such costs, and by granting such concessions, the Lackawanna is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages in violation of section 3 of said act, and departs from its published tariff rates in violation of section 6 of said act.

Lehigh Valley Railroad Company

The warehousing facilities and operations of this respondent are discussed in the prior report beginning at page 156. At page 160 its warehousing activities at Claremont Terminal, which is one of the more important railroad terminals serving the Port of New York district, are described. Among the facilities at Claremont is a 2-story steel and concrete warehouse and pier about 1,000 feet long and 127 feet wide, with a combined capacity of 600 carloads. From testimony on further hearing, it appears that on July 1, 1935, this respondent's so-called storage-in-transit operations were conducted at the Claremont Terminal exclusively. At that time the Lehigh Valley had in storage at that point 12,404,740 pounds, or more than 6,000 tons, of westbound freight. Of this amount slightly more than 50 per cent was crude rubber, about 25 per cent cocoa beans, and the remainder naphthalene, paraffin wax, and rags. The storage of westbound freight is discussed later herein, but it seems pertinent to here point out that an exhibit of record shows that, on crude rubber remaining in storage for a period of 20 months, the handling cost, and storage cost, which does not take into account any depreciation on the building, exceed the entire amount of revenue which the Lehigh Valley receives as its divisions for transporting crude rubber from shipside to the end of its line at Buffalo, N. Y. In other words, this means that on crude rubber unloaded from vessels and stored at Claremont for 20 months, reloaded, and hauled to Buffalo, the actual monetary loss for the storage and handling is greater than the division received by the Lehigh Valley for the transportation of the goods. No west- [fol. 153] bound freight is now stored in lighters or barges.

The record on further hearing indicates that the five piers at Jersey City, mentioned in the prior report, are used as there described.

While the subject of flour storage is discussed later herein, some mention thereof should be made at this point. In the prior report we stated that the Lehigh Valley occupied pier 44, East River, under lease from the city of New York, and it is there shown that leases were made on the second floor of that pier to flour-distributing concerns. Those or similar leases are at present in force. Similar leases are also made to flour truckers and dealers at the Jersey City piers of the Lehigh Valley. As shown later in this report, the dealers and distributors of flour avoid tariff storage charges by availing themselves of the leasing arrangements. The record shows that it has been the practice to permit lessees of space for flour storage to use without charge additional space adjacent to that leased. Although it is claimed by the Lehigh Valley that these practices have been or will be corrected, it is clearly evident that shippers who are permitted to occupy space without payment therefor are granted concessions or offsets from the published transportation charges. On flour stored at the Lehigh Valley's Jersey City piers, the expense of unloading the flour in the leased space, and of reloading it when it is distributed from such space, is borne by respondent. On the contrary, if the flour be transported to Jersey City by the Lehigh Valley, unloaded and stored in private warehouse space, and reloaded for distribution, the Lehigh Valley bears none of the expense of unloading or reloading. The only reason given for the difference in treatment of shippers who store at the Lehigh Valley piers and those who store in private warehouses was that it has long been the custom of the respondent to stand the handling expenses when flour is stored on its piers. It should be pointed out in this connection that on flour which arrives and is stored at the Lehigh Valley piers in Jersey City, and is reloaded and moved to Lehigh Valley pier 44, and there unloaded and placed in leased space, three handlings are necessary, and under its tariff provisions the expense thereof is borne by the Lehigh Valley.

The subject of leasing space to dealers and distributors of flour was given consideration by a committee composed of respondents' executives, after the prior report was issued, and it was recommended by that committee that all

leases to stevedores or truckmen in either owned or controlled warehouses or piers for the storage or holding of freight prior to final delivery by the carrier should be canceled. The recommendation was not adopted, because of [fol. 154] the opposition of the Lehigh Valley, and at the further hearing it was testified that the Lehigh Valley has no intention of canceling such leases.

The insurance practices of the Lehigh Valley are discussed in a later section of this report.

National Storage Company.—This company is described in the prior report at page 159. The vice president of the Lehigh Valley has general charge of its operations. The record on further hearing indicates that the warehouses of that company are still used, principally for the storage of raw sugar. It is shown that for some time the National Storage Company has been unable to obtain sugar for storage at the former rate of 30 cents per ton per month. The vice president in charge stated that at present he would approve storage of sugar at 15 cents, as the property is of no great value and it seems advisable to him to obtain whatever revenue is possible to help pay taxes and expenses. In the absence of evidence showing that the persons who avail themselves of this storage are shippers by rail in interstate commerce, we are unable to make a finding to the effect that the noncompensatory storage rate works departures from the carrier's published transportation charges and results in a concession to the shipper.

The deficits of this company in connection with its operations for the 12-month periods ending December 31, 1933, and 1934, and for the first 4 months of 1935, were \$5,374.75, \$8,680.73, and \$9,588.48, respectively. These amounts do not take into account any depreciation on the buildings. Our conclusions with respect to the inclusion of an item of depreciation on buildings devoted to storage and warehousing as set forth later herein in connection with the Pennsylvania Railroad, are likewise applicable to the Lehigh Valley.

Bronx Lehigh Building.—This building, which is located on the Harlem River, is described in the prior report at page 156 under the heading of "Bronx warehouse." The Bronx terminal of the Lehigh Valley, used in connection with this building, is reached by car float from the Jersey City terminals of that carrier. It is shown in the prior

report that the building was constructed at a total cost of \$1,419,631.83, and was opened for operation on May 15, 1929. It is owned by the Pioneer Real Estate Company, which is a wholly owned subsidiary of the Lehigh Valley. The directors and officers of the real-estate company are also directors and officers of the Lehigh Valley. A vice president in charge of the financial and accounting departments of the Lehigh Valley has supervision over the Bronx Lehigh building, and the manager of the building reports to that vice president.

[fol. 155] Respondent does not itself, nor through its subsidiary, operate a warehouse business in the building, but leases space therein to tenants. Various lines of business are conducted by these tenants, among them being that of warehousing. Intensive traffic solicitation is conducted by the Lehigh Valley traffic and other departments to obtain business for tenants who occupy space in the building in order that the Lehigh Valley may benefit by the movement of traffic over its line.

At the time of the further hearing, 67.7 per cent of the space in the building was leased. The rental rates for permanent leases range from 27 to 53 cents per square foot per year. In the prior report we found that the Lehigh Valley had refused to rent space in the Bronx Lehigh building to numerous prospective tenants because such tenants had little or no traffic which could be attracted to respondent's line. On further hearing it was testified that that policy has since been abandoned. One of the tenants, referred to in the prior report as the Harlem Company, conducts a public-warehouse business in the building, consisting of the storage and distribution of automobiles. In the discussion of that company, it is shown that various reductions in rent had been made to it by the Lehigh Valley because its business had not been profitable. It is also shown that considerable space had been occupied in the building for which it paid no rent. At the further hearing it was shown that as of March 31, 1935, the Harlem Company was delinquent in its rental in the amount of \$15,402.49. Another tenant, the American Bread Wrapper Company, was \$9,121.20 in arrears and other tenants were in arrears for amounts ranging from \$78.85 to \$700.

The net income from operation of the Bronx Lehigh building for the year ended December 31, 1933, was \$31,910.20; 1934, \$33,743.71; and for the first four months of 1935, \$8,-

925.36. The income statements on which those figures appear include no item for depreciation or interest on the investment. Our conclusions with respect to depreciation are referred to above in connection with the National Storage Company. The failure to include as an item of general expense the interest on the investment was attributed by the vice president of the Lehigh Valley to the fact that there was no indebtedness on the building, it having been paid for out of advances by the Lehigh Valley.

Starrett Lehigh Building.—The prior report shows at page 158 the circumstances under which this building was constructed, and that on June 22, 1932, the Pioneer Real Estate Company, as previously shown, a wholly owned subsidiary of the Lehigh Valley, was forced to take over the [fol. 156] property by assuming a mortgage of \$4,500,000. At the further hearing it was stated that the Lehigh Valley's connection with this building has been an unfortunate venture, and that at one time some of respondent's officials had advised abandonment of the building because of the "danger of having a white elephant on our hands." When the Pioneer Company assumed the mortgage, its investment, including the cost of the improvements, interest, and taxes in arrears, amounted to \$6,649,000. It was necessary to subordinate the Bronx Lehigh building thereto, and also to take out additional insurance in the amount of \$100,000 on the latter building.

The supervision and management of the Starrett Lehigh building is in all respects identical to that of the Bronx Lehigh building. Traffic solicitation is conducted for tenants of both buildings and the operations are conducted in the same manner. Handling is performed for tenants at a charge which it was testified is in all cases compensatory. The Lehigh Valley pays the Pioneer Company a rental of \$50,000 per year for the lower floor, which is used as a team-track yard. One tenant, the Midtown Warehouse Company, conducts a general warehousing business and occupies more than 100,000 feet of space. Most of the goods stored by this tenant move by rail although some of them are handled by truck. On June 30, 1935, there were 90 tenants in the building, occupying 1,052,781 square feet of space, which is 58.07 per cent of the total floor area. Rentals made at various rates are governed somewhat by location in the building. The rental rates are based on competitive conditions and

are stated to be as high as the traffic will bear. They are considerably less than those projected by the company which erected the building. It was testified that in order to obtain tenants it was necessary to offset the rentals such tenants were obligated to pay elsewhere. In most cases "deals" are made in obtaining tenants, and the rental rate which the tenant is able to obtain depends largely upon his skill as a negotiator. The vice president in charge of the building described these deals as "horse trades" and stated it was necessary to deal on this basis in order to obtain tenants. Not all of the tenants in the Starrett Lehigh building are shippers in interstate commerce, but many of them are. The law is well settled with respect to deals and trades in connection with transportation made with shippers in order to obtain traffic over a carrier's lines. *Spencer Kellogg & Sons v. United States*, 20 Fed. (2d) 459; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, supra; *Central of Georgia Ry. Co. v. Blount*, supra. Extensive alterations are necessary in many cases to fit the space to be occupied to suit the particular business in which the tenant engages. It is of course impossible to say what returns are actually made for space [fol. 157] rented, without considering the alterations. Where large amounts of space are taken by tenants a reduction in the rental rate is made. In some cases the tenant agrees by the terms of his lease to pay for a part or all of the alterations unless he occupies the space for a stipulated time. In many instances free rent is granted for a period of time at the beginning of the lease term. There appears to be no definite time limit for which the Lehigh Valley will permit occupancy of its premises before the beginning of rental payments. The vice president of the Lehigh Valley asserts the right to permit such occupancy for periods of at least a year. Under that assumption it would, of course, be permissible for the carrier to allow free occupancy of its premises for any amount of time. We cannot condemn such practices too severely when we consider their effect on persons operating warehouses in competition with the one here considered.

There is no disposition on the part of the Lehigh Valley to contend that the operations of this building or the Bronx Lehigh building are not directed by that respondent or that the Pioneer Company is anything more than a holding company for the property. In 1933 the operation of the Starrett

Lehigh building resulted in a loss of \$394,000. For the year 1934 the loss amounted to \$200,000. These losses do not include any item for depreciation, although it was admitted that such an item should properly have been included, 2 per cent being admitted a reasonable figure. Our conclusions with respect to depreciation have been previously mentioned in connection with the Lehigh Valley's National Storage Company.

Considerable difficulty has been experienced in collecting rentals. In some instances, as stated at the further hearing, it has been found impossible to make collections, and in others, collections are made only after several months' delinquency. The failure to collect rentals in some cases resulted in the reorganization of the tenant's business, and in one case the Lehigh Valley was forced to take over a warehousing business, which was resold shortly thereafter. Difficulty has also been encountered in collecting rents from tenants on piers owned or controlled by the Lehigh Valley. A large number of the tenants in the Starrett Lehigh building were in arrears in their rent as of March 31, 1935, for various amounts, the total being \$126,000. Numerous accounts, amounting to the sum of \$24,000, were in the hands of the law department for collection. In many cases leniency is shown in the collection of rentals, as the carrier feels it would serve no good purpose to crowd the tenants into receivership. Some of the accounts are not expected to be collected. It is shown that some tenants are not shippers of traffic over the Lehigh Valley, but a large percentage of the [fol. 158] tenants are shippers. It is claimed that whether or not they are shippers has no effect on the treatment of delinquent accounts.

It was the original intent that the operation of the Starrett Lehigh and Bronx Lehigh buildings would attract traffic to the Lehigh Valley, and the intention is carried out at present. The failure to collect rentals from persons who use the Lehigh Valley line in transporting their shipments results in the same situation as to both the shipper and the Lehigh Valley as the failure to exact compensatory rentals. Numerous cases dealing with the question of rentals have been presented to us and to the courts. *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, *supra*; *Central of Georgia Ry. Co. v. Blount*, *supra*.

Summary of Principal Findings of Fact

1. The Pioneer Real Estate Company is a wholly owned and controlled subsidiary of the Lehigh Valley. The railroad dominates and controls the real-estate subsidiary and the latter is in effect a part of the railroad.

2. The Lehigh Valley, through its said wholly owned subsidiary, owns and operates buildings described of record as the Bronx Lehigh Building and the Starrett Lehigh Building, and engages in renting space in said buildings to certain shippers in interstate commerce for storage, warehousing, and manufacturing purposes at rates which fail to compensate said railroad for the cost of providing said space.

3. The Lehigh Valley, through its said wholly owned subsidiary, permits certain tenants, shippers in interstate commerce, to occupy space in said buildings for substantial periods of time, without collecting from said shippers the amount of rental due under the leases.

4. The Lehigh Valley, through its said wholly owned subsidiary, permits certain shippers in interstate commerce to occupy space in said buildings under rental arrangements which are arrived at by bargaining between officials of the railroad company, or its wholly owned subsidiary, and said shippers without regard to rental charges to other shippers for like space.

5. The Lehigh Valley, through its said wholly owned subsidiary, makes alterations and improvements in said buildings without charge to certain shippers in interstate commerce. These expenditures, which affect the cost to the Lehigh Valley and the value of the space to the shippers, further reduce the net compensation derived by the Lehigh Valley under said leases.

6. The Lehigh Valley, through its said wholly owned subsidiary, permits certain shippers in interstate commerce to [fol. 159] occupy space in the Starrett Lehigh building without charge, for varying periods of time at the beginning of the term of lease.

7. The Lehigh Valley, through the practices described in connection with the leasing of space, failure to collect rentals, making alterations and improvements for certain ship-

pers at its own expense, and permitting free occupancy of space by certain shippers assumes a part of the cost of conducting commercial operations of certain shippers in interstate commerce over its line.

8. The Lehigh Valley does not bear any portion of the expense of conducting the commercial operations of other shippers for whom it transports freight in interstate commerce, and who lease space in warehouses which compete with its said wholly owned subsidiary.

We find that by assuming a part of the costs of conducting commercial operations of certain shippers in interstate commerce, by leasing storage, warehousing, and manufacturing space at noncompensatory rentals, and by following other practices described herein, the Lehigh Valley grants unlawful concessions to said shippers, and reduces below its published tariff rates the transportation charges paid by said shippers.

We further find that by assuming a part of such costs, and by granting such concessions the Lehigh Valley is guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages, in violation of section 3 of said act, and departs from its published tariff rates, in violation of section 6 of said act.

Central Railroad Company of New Jersey

The warehousing operations of the Central Railroad Company of New Jersey were discussed in the prior report, beginning at page 153. It was there shown that this respondent owned a number of buildings in the Bronx, which it rented to various concerns for business purposes. There have been no particular changes in connection with those buildings, and they will not be further discussed. Such changes as have been made with respect to storage and warehousing at piers 5, 11, and 14, where operations are still conducted by the Jersey Central, are later covered in our discussion of insurance and storage of eastbound and west bound carload freight.

Newark Warehouse Company.—In the prior report we stated at page 154:

The Newark warehouse was constructed and financed by the Jersey Central as a medium through which traffic would be attracted to its line. Traffic solicitation and advertising for the warehouse company emanate from the freight-traffic department of the Jersey Central in connection with the railroad's traffic information.

[fol. 160] At the further hearing it was testified by a witness for the Jersey Central that at the time the warehouse was constructed in 1906 there was considerable demand in Newark for warehousing facilities, and that the attraction of traffic to its line was not the sole purpose for its erection. The record is conclusive, however, that the warehouse is an adjunct of the railroad's traffic department, and that the latter has made continuous and intensive efforts to solicit traffic over its line for storage in the warehouse.

During the 30 years of its existence, the operations of the Newark Warehouse Company, a wholly owned subsidiary of the Jersey Central, do not appear to have ever been really profitable. The only dividends received by the Jersey Central from the warehouse company amounted to \$500 annually for about three years between 1924 and 1930, but during practically all this time the warehouse company received rent from the Jersey Central for space occupied by the latter and used for freight-station purposes. In other words, the Jersey Central carried the burden resulting from the unprofitable warehouse operations. Due to a severe decline in business partly caused by the depression, the Jersey Central in 1932 abandoned the space occupied in the warehouse building, moved its freight-station facilities to another location, and discontinued the substantial rental payments to the warehouse company.

During the period from June 1, 1933, to May 31, 1934, the operations of the Newark Warehouse Company resulted in a deficit of \$99,707.95. The warehouse company also defaulted in its monthly payment of interest of \$5,500 after December 1933 on the bond amounting to \$1,100,000 held by the Jersey Central to cover advances for the construction of the building. The payments were carried on the books of the warehouse company as deficits for the first four months of 1934, and thereafter were not accounted for. Nothing was done by the Jersey Central in connection with the principal of the bond or the collection of the interest.

thereon. At the end of the calendar year 1934 the deficit incurred from operation of the Newark Warehouse Company during its existence had reached the amount of \$423,000.

The large deficits, resulting from the decrease in business of the warehouse company and the transfer by the Jersey Central of its freight station therefrom, resulted in combined efforts of the warehouse company and the Jersey Central to lease the warehouse in whole or in part. Several leasing propositions were considered, an unsuccessful effort was made to interest parties in operation of the warehouse as a public garage, and efforts were made to sell the property, but no purchaser could be found. An arrangement was finally made through which a group of men, none of [fol. 161] whom were connected with the Jersey Central or its subsidiaries, organized a corporation capitalized at only \$5,000, to be known as the Newark Central Warehouse Company, hereinafter termed the Central Warehouse Company, for the purpose of leasing and operating the warehouse. The Newark Warehouse Company leased the building to this corporation for a 2-year period beginning June 1, 1934. It was testified that the building was badly in need of repair at the time it was leased to the Central Warehouse Company. The lessor agreed to make certain repairs and alterations, to keep the railroad tracks within the building in good order, and to pay all taxes on the property. The lease provides for an annual rental of \$5,000 plus 40 per cent of the first \$10,000 in earnings, 60 per cent of the second \$10,000, 75 per cent of the third \$10,000, 80 per cent of such earnings between \$30,000 and \$110,000, and 60 per cent of the earnings in excess of \$110,000. The Central Warehouse Company was given the privilege of renewing the lease after the two-year period had expired, under the following conditions. The rental in addition to \$5,000 for the second year and each year thereafter up to 12 years from the date of lease shall be \$40,000, or the amount of the taxes paid by the lessor, whichever is the greater. In other words, the Newark Warehouse Company would receive the additional rental only in the event that the Central Warehouse Company's operations during the first two years made it appear that it would be profitable for it to continue in business. Otherwise the warehouse can be turned back to the lessor, and the Central Warehouse Company is bound

to pay only \$5,000 for each of the two years plus a percentage of the profits if any are made. Under the lease arrangement the amount of rental paid by the Central Warehouse Company, based on the business which it had done during the first year of its occupancy, was \$17,217, slightly less than one half of the taxes on the building for that period. During that time the Newark Warehouse Company expended \$38,560 in repairs on the building, and the depreciation thereon amounted to approximately \$21,500.

In summarizing the warehousing operations of the Jersey Central as set forth in the prior report and the evidence given on later hearing, it clearly appears that regardless of the fact that the Newark Warehouse Company is a corporate entity, it is, and at all times since its incorporation has been, a subsidiary of the Jersey Central and responsive to its direction and control. We must, therefore, consider that the warehouse company has been and is a part of the Jersey Central, and that the responsibility for any violation of the Interstate Commerce Act resulting from operations of that warehouse company must rest upon the railroad. It necessarily follows that the Jersey Central provides warehousing facilities for the Central Warehouse [fol. 162] Company, a corporation independent of the Jersey Central, at rentals which are wholly noncompensatory. The most optimistic hope of the Jersey Central appears to be that it will receive sufficient rental, after the Central Warehouse Company has had time to build up a warehouse business, to pay the taxes on the building, which amount to approximately \$35,000 annually. The present operations of the Central Warehouse Company are, therefore, experimental in nature, and conducted in premises on which the ultimate expense is principally borne by the Jersey Central.

It is clearly established that the Central Warehouse Company engages in a general warehouse business and performs any or all services necessary in conducting that business. In many instances it has dominion for transportation purposes as consignee or consignor (Cf. *Merchants Warehouse Co. v. United States*, supra.) over goods shipped in interstate commerce and stored by it. It engages in whatever branch of the general warehousing business it considers profitable, including the handling of cars containing shipments for two or more consignees, and occasionally handles the equivalent of pool cars. In some cases

the warehouse company pays the freight charges to the railroad and later collects from the owners of the goods.

Through this leasing arrangement, the Jersey Central, through its subsidiary warehouse company, subsidizes the Central Warehouse Company and places it, a "person" within the meaning of that word as used in sections 2 and 3 of the act, in a position of superiority over other such persons engaging in the warehouse business and thus permits it to underbid such other competing persons for storage of shipments transported in interstate commerce.

In the prior report, beginning at page 189, we summarized the testimony of the complaining warehousemen and their complaint with respect to the competition which they met from railroad owned or controlled warehouses. At the further hearing a warehouse operator who is a shipper in interstate commerce testified that the competitive situation between the independent warehouses and the railroad warehouses had become progressively worse since the prior hearing, that the Central Warehouse Company is among his competitors, and that shortly before the later hearing his warehouse had lost considerable business to the Central Warehouse Company because the latter's rates were cut to a point where they could not be met by his company. He further testified that his rates were not abnormally high to begin with, and that he offered to lower them, at first 10 per cent and eventually 20 per cent, in order to retain the business, but that the Central Warehouse Company obtained the business by offering storage rates and handling charges averaging 48.47 and 63.74 per cent, respectively, below the storage rates and handling charges of his company.

The foregoing facts lead us to consider the legal aspects of the arrangements through which the Jersey Central subsidizes the Central Warehouse Company by failure to exact compensatory rentals for its warehouse space. Similar questions have been presented to us and the courts in several cases. In *Leases and Grants by Carriers to Shippers*, supra, *Central of Georgia Ry. Co. v. Blount*, supra, and *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, supra, and in the decisions cited therein it is clearly established that when traffic considerations are the moving cause of inadequate rentals such transactions amount to unlawful concessions.

In *Spencer Kellogg & Sons, v. United States*, supra, the court, in referring to section 1 of the Elkins Act, stated:

It declares it to be unlawful for any person or corporation to offer, grant, or give any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce, whereby any such property shall be by any device whatever transported at a rate less than that named in the tariffs. * * * Congress intended to prohibit all rebates, concessions or discriminations with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers.

The question as to whether allowances may lawfully be paid by a carrier to a warehouse company for services ostensibly a part of the service which carriers are obligated to render, but which are in fact commercial services, was decided in *Merchants Warehouse Co. v. United States*, supra, where the court said at page 511: "Such allowances are forbidden even though paid to appellants [warehouse companies] and their competitors alike, since as to both they would be departures from carload rates of the published tariffs and amount to rebates." Subsidies in the form of noncompensatory rentals for space occupied are the equivalent of allowances paid in money and in either case if paid for services not a part of a carrier's obligations are unlawful concessions. As also clearly indicated in the *Merchants Warehouse Co. v. United States*, supra, a further violation of the act results from the unjust discrimination and undue prejudice against persons operating warehouses in competition with the persons operating the warehouses which receive such concessions.

Summary of Principal Findings of Fact

1. The Newark Warehouse Company is a wholly owned and controlled subsidiary of the Jersey Central. The railroad dominates and controls the warehouse company and uses it as an adjunct of its traffic department. The warehouse company is in effect a part of the railroad.

2. The Jersey Central, through its said wholly owned subsidiary, permits the occupancy, by the Newark Central [fol. 164] Warehouse Company, of the warehouse of its wholly owned subsidiary at Newark, N. J., described of record, under leasing arrangements which fail to compensate said railroad for its cost in providing space in said warehouse.

3. The Newark Central Warehouse Company is a shipper in interstate commerce, and stores goods for shippers in interstate commerce in competition with certain other warehouse companies who are also shippers in interstate commerce and who store goods for other shippers in interstate commerce over the Jersey Central in the Port of New York district. The Jersey Central, through leasing arrangements with the Newark Central Warehouse Company, as described of record, bears directly a portion of the expense of commercial operations of the latter company, and indirectly a portion of the expense of commercial operations of the shippers who store goods with the latter company. The Jersey Central does not bear any portion of the expense of commercial operations of the competing warehouse companies or of shippers who store goods with such warehouse companies.

We find that, by means of the leasing arrangements described of record, the Jersey Central reduces below the published tariff rates the transportation charges on interstate shipments handled or stored by the Newark Central Warehouse Company, and thereby the Jersey Central grants concessions on such interstate shipments to the extent of the difference between the cost to said railroad of providing said space and the amount which it receives for the occupancy thereof.

We further find that through such leasing arrangements and by granting such concessions, the Jersey Central is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the Newark Central Warehouse Company and to shippers who store goods therewith, and subjects competing warehouse companies and shippers who store with such warehouse companies to undue and unreasonable prejudice and disadvantage in violation of section 3 of said act, and departs from its published tariff rates in violation of section 6 of said act.

Erie Railroad Company

In the prior report the warehousing operations of the Erie were discussed beginning at page 181. It appears from the record on further hearing that the Erie continues to use the pier space mentioned in that report, and

while there have been changes made in the persons to whom space is leased, it was testified that there has been [fol. 165] no change in the Erie's general policy with respect to leasing of pier space, which is made at variable prices. It was testified on behalf of the Erie that it attempts to obtain the best rental possible for the space. The Lorillard and Ault-Wiborg buildings, mentioned in the prior report, are no longer used by the Erie in its warehousing operations.

In the prior report under the heading "Tooker Storage & Warehousing Company", it is shown that the Erie leased 32,264 feet of space at approximately 28 cents per square foot, in its Twenty-eighth Street freight house to the above company, and that a considerable loss on the property was borne by the Erie. The Penn Storage & Warehouse Company now leases about 74,000 square feet of space in that freight house, which includes the space formerly occupied by the Tooker Company, at an annual rental of 30 cents per square foot.

Long Dock Company.—There has been no change since the prior report in the Erie's interest in the building described under the above heading in that report. The building is now known as Dock No. 2 warehouse. On March 1, 1935, more than 10,000,000 pounds of crude rubber were stored therein under the Erie so-called storage-in-transit tariff. In the prior report it is shown that the loss on similar freight stored in that building for the year 1931 averaged \$2.76 per ton, without considering a return on the value of the land on which the building is located. It is conceded by the Erie that at present the charges for similar storage are no more compensatory than at the time of the first hearing. However, since the storage of eastbound and westbound carload freight, insurance, and storage of flour by the Erie are included in our general discussion of these subjects, they will not be further mentioned here.

In the prior report at page 187, we stated that the United States Trucking Corporation, Independent Warehouses, Incorporated, and the Erie are members of the corporate family of which the Allegheny Corporation is the head. The Independent Warehouses, Incorporated, operates several commercial warehouses in Manhattan, in which it conducts a general merchandise-warehouse business. Four of

these warehouses are named in the tariffs of the Erie as inland stations, although not reached by railroad sidings. At that time the Erie employed the above trucking corporation to transport commodities between its terminals in Jersey City and the inland stations. At the further hearing it was testified that since December 1, 1933, the Erie has hired trucks from the trucking corporation at the rate of \$32 per day and performs its own trucking service, which is more economical than paying on a tonnage basis as for- [fol. 166] merly. It is contended by the operator of a commercial warehouse, a competitor of the Independent Warehouses, that all the commodities trucked from the Erie terminals in Jersey City to the inland stations in the buildings of the Independent Warehouses are not in fact delivered to the inland stations, but that some are delivered directly to the Independent Warehouses. In other words, he contends that the Erie has been and is bearing the expense of trucking commodities placed in storage with the Independent Warehouses, and that he has lost storage accounts by reason of that practice. The evidence is not sufficient to support a finding that the Erie has delivered or does deliver freight to the Independent Warehouses except through its inland stations.

Seaboard Terminal & Refrigeration Company.—In the prior report at page 181 we set forth the circumstances under which this company, hereinafter referred to as the Seaboard Company, was formed. Its operations began in 1927, in a 10-story building which it had erected in Jersey City on land leased from the Erie through two of its subsidiaries. The Erie leased the four lower floors, containing 320,000 square feet of space, at an annual rental rate equivalent to 85 cents per square foot, to be used for the development of modern terminal facilities for the handling of fruit and vegetables. It was contemplated that such facilities would be complemented by the Seaboard Company's cold-storage warehouse operations, which were to be and are conducted on the six upper floors. The Erie was unsuccessful in its attempt to secure patronage for its fruit and vegetable terminal, and consequently was left with a large amount of space in the building which it could not use profitably. In order to utilize this space the Erie transferred its Jersey City freight station to the building, al-

though the freight house formerly used seems to have been ample to provide the necessary common-carrier facilities. The remaining space was utilized for storage of westbound carload freight, and in appendix III to the prior report it is shown that on freight thus stored the Erie suffered a loss of \$6.18 per ton. At the time of the further hearing the Erie's space in this building was used principally for the storage of westbound carload freight. As of March 31, 1935, approximately 17,000,000 pounds of crude rubber were stored, on which losses similar to the above resulted to the Erie. Those losses were largely occasioned by the fact that the Erie leased the space at a rate of 85 cents^a from the Seaboard Company under circumstances highly advantageous to the latter.

We have previously herein discussed the present arrangements in connection with the leasing of space by the Kraft [fol. 167] Phenix Cheese Corporation in the Lackawanna Terminal Warehouse Company's building. As there shown the Kraft company was a tenant in the Seaboard Company's building from 1929 to 1934. The space occupied by the Kraft company was a part of the space which was originally leased by the Seaboard Company to the Erie at 85 cents. In order to attract the Kraft company's traffic to its line, the Erie in January 1929 surrendered to the Seaboard Company 43,638 square feet of space, which was then leased to the Kraft company at a rental of 32 cents. Thereafter the rental for this space paid by the Erie to the Seaboard Company was reduced by the amount which the Kraft company paid to the Seaboard Company, which resulted in the Erie's indirectly furnishing space to the Kraft company at less than the cost thereof to the Erie. It appears that at that time a reasonable rental rate for the space was not less than 44 cents. The Kraft company is a shipper in interstate commerce, and at that time was using the Erie's line for transportation of its traffic. The arrangement continued until 1934, when the Kraft company changed its location to the Lackawanna's warehouse. Since that time the Erie has paid the Seaboard Company the rate of 85 cents.

At page 184 of the prior report it is shown that on July 1, 1931, the Erie surrendered to the Seaboard Company

^a The rental rates herein will be stated in cents per square foot per year.

11,483 square feet of space on the fourth floor of the building for which the Erie was obligated to pay 85 cents. This space was then leased by the Seaboard Company to the Great Atlantic & Pacific Tea Company at 50 cents, leaving 35 cents to be paid by the Erie to the Seaboard Company for that space. On May 1, 1932, the Erie leased direct to the Tea Company at 50 cents 11,718 square feet on the third floor, for which the Erie was paying and continued to pay 85 cents. It is also shown that alterations costing \$9,168.85 in the above space were paid for by the Erie. Before locating in the Seaboard Company building, the Tea Company had been leasing space elsewhere at rates of 60 and 80 cents. Similarly the Albert and Gerber Company subleased 3,618 square feet of the Erie's space at a rate of 50 cents. The Tea Company and the Albert and Gerber Company were occupying the space at the time of the further hearing under circumstances as above shown. Both of these companies are shippers in interstate commerce, and the Erie secures their traffic, or a large portion thereof, by reason of the rental arrangements now in effect.

In financing its building the Seaboard Company advertised to prospective investors that the rental to be paid by the Erie for the four lower floors would be sufficient to cover the maximum interest on its bond issue of \$3,000,000. It also advertised that it expected to make a substantial profit through its contract to handle freight for the Erie.

[fol. 168] Summarizing the arrangements between the Seaboard Company and the Erie, we find that the parties entered into a contract by which the Erie agreed to pay 85 cents for space in the Seaboard Company's building for which a reasonable rental, as shown by the prior report, would have been between 44 and 50 cents. Taking 47 cents, the average of 44 and 50 cents, as reasonable for this space, it is evident that the Erie originally subsidized the Seaboard Company by the amount of 38 cents, the difference between 85 and 47 cents. Subsidies in that amount or greater have continued to the present time and constitute a device used to purchase interstate traffic for the Erie's line.

In *Merchants Warehouse Co. v. United States*, supra, the court found that an allowance may not lawfully be made by a carrier to a warehouse company for its performance of commercial services for shippers. In the section of this report devoted to the operations of the Central Railroad Company of New Jersey, we have found that subsidies, the

equivalent of allowances, may not lawfully be paid by a railroad through its failure to collect compensatory rentals for a carrier's warehouse space occupied by a warehouse company. Payment by the Erie of excessive rental for space occupied by it in the warehouse of the Seaboard Company accomplishes purposes similar to those resulting through the payment of allowances for commercial services performed by the warehouse company forbidden in *Merchants Warehouse Co. v. United States*, supra. Such allowances were there found to constitute departures from the published tariffs; and amount to rebates. The same results are accomplished by the Erie's subsidy to the Seaboard Company as were condemned in the *Merchants Warehouse Co. v. United States* supra.

The record shows that certain complaining warehousemen operate warehouse companies located in Jersey City. These companies occupy the position of shippers in interstate commerce. Some are served by the Erie and some by other respondent carriers. These warehouse companies are competitors of the Seaboard Company, likewise occupying the position of a shipper, and the concessions or rebates paid by the Erie through excessive rentals to the Seaboard Company place the latter in a position of superiority over the competing warehouse companies, and enable it to underbid those competitors for storage of shipments transported in interstate commerce. As previously stated, the complaining warehouse companies are entitled to the protection afforded by the act. Through the practice of the Erie in bearing a portion of the expense of commercial operations of the Seaboard Company, the Erie is subjecting [fol. 169] such competing warehouse companies to unjust discrimination and undue prejudice forbidden by the act.

Summary of Principal Findings of Fact

1. The Erie, through two wholly owned subsidiary companies, owns land in Jersey City, N. J., a portion of which is occupied by a 10-story building owned by a company, herein referred to as the Seaboard Company.

2. The Seaboard Company operates a cold-storage warehouse and stores goods in said building, and is a shipper in interstate commerce over the Erie. The Seaboard Company competes with other cold-storage warehouse companies who are shippers in interstate commerce in the Port of New York district, and who are also served by the Erie.

3. The Erie leases certain space in said building, described of record, from the Seaboard Company at a rental rate which at the time the lease was executed was, and at the present is, in excess of the fair rental value of said space, thereby subsidizing and granting concessions to the Seaboard Company, and assuming a portion of the cost of conducting the commercial operations of said company.

4. The Erie does not bear or assume any portion of the cost of conducting commercial operations of said warehouse companies which compete with the Seaboard Company in the Port of New York district.

We find that the Erie subsidizes, grants concessions to, and assumes a portion of the cost of conducting the commercial operations of the Seaboard Company through leasing arrangements with that company, described of record, and that such leasing arrangements and the rental rates paid thereunder give undue and unreasonable preference and advantage to the Seaboard Company, work unjust discrimination and undue and unreasonable prejudice and disadvantage to competing warehouse companies, and departures from the Erie's published tariff rates in violation of sections 2, 3, and 6 of the Interstate Commerce Act.

New York Central Railroad Company

The New York Central conducts its warehouse operations directly and not through subsidiary corporations. These operations are discussed in the prior report beginning at page-173. Since that time, because of decreasing business in traffic which requires storage, the New York Central has canceled the leases whereby it formerly occupied piers 22, 72, 73, and 99, North River, and piers 4 and 33, East River, which are owned by the city of New York. It has made other changes in its storage practices, such as the discontinuance [fol. 170] of storing freight in outside warehouses or with outside warehouse companies. Its practices with respect to insurance, flour storage, and storage of eastbound and westbound carload freight are discussed in other sections of this report.

In the prior report it is shown that this respondent was then erecting a building, referred to as the Spring Street warehouse, which, except for certain space to be used for freight-station purposes, was to be operated by the United States Cold Storage Corporation. The contractual and

financial arrangements between respondent and that corporation were therein described. At the further hearing it developed that the contract has been canceled, but that the New York Central retains its investment in the cold-storage corporation's stock. The plans contemplated the erection of a building approximately 800 feet long, 250 feet wide, and 12 stories high, but only three stories were actually built, the investment amounting to about \$6,500,000. It is known as the St. John's Park Terminal, and except for 191,980 square feet of space leased to the F. C. Linde Company for warehouse purposes at an annual rental of \$98,498, is used by the New York Central for a freight station and for storage purposes. The Linde Company formerly conducted warehouse operations in a building owned by the New York Central and described at page 176 of the prior report. This building has since been abandoned.

There is no necessity for discussing the warehousing practices of the New York Central. The record discloses the competitive situation existing between it and the other respondents. In some respects the New York Central has indicated a disposition to follow the prior report. While the fact that further progress was not made in that direction is said to be due to the lack of cooperation on the part of certain other respondents, this does not explain the failure to correct one of its practices described in detail in the prior report, i. e., the arrangements in connection with the storage of automobiles described under the headings "Kingsbridge Warehouse" and "Jay A. Mellish Warehouse Company Incorporated."

The inception, construction, and operation of the Kingsbridge warehouse, and the serious losses to the New York Central through its arrangements with the Kingsbridge Auto Storage & Warehouse Company and the latter's close affiliate, the Jay A. Mellish Company, are discussed in detail in the prior report. The losses resulting from noncompensatory rentals, allowances, and payments for automobile storage are pointed out. These have continued with the exception that automobiles are not now stored with those companies for the account of the New York Central.

[fol. 171] Unit no. 2 of the Kingsbridge warehouse is vacant, respondent having been unable to secure a tenant, and a 3-story building located on West Fifty-fifth Street, formerly leased to the Auto Storage Company, and described on page 176 of the prior report, has been torn down.

From testimony at the further hearing it appears that the rental paid by the Auto Storage Company has not been changed, but the lease to the Mellish Company was revised on January 1, 1935. That lessee now pays a minimum rental of \$15,000 a year, plus a percentage of any rental which may be collected from subtenants over and above a certain minimum. Under such leasing arrangements it is apparent that the rental paid is indefinite and affords opportunity for the collection of noncompensatory rentals such as have been condemned in other cases. Leases and Grants by Carriers to Shippers, *supra*; Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, *supra*.

Respondent's arrangements with the Auto Storage and Mellish companies, by which those companies perform the unloading of automobiles, have been continued. The allowance for such unloading is \$1.50 per automobile, or an average of about \$5.25 per freight car.

Without reviewing in detail the discussion of the arrangements between the New York Central and the Auto Storage and Mellish companies, as set forth in the prior report, it should be recalled that the purpose of the New York Central in entering into the arrangements was to increase traffic over its line. The New York Central recognized that losses would thereby result, and intended to absorb such losses in the line-haul revenue on traffic which it hoped would be increased through traffic solicitations of the Auto Storage and Mellish companies. The arrangements, therefore, must be construed as a device to purchase traffic through the rental of space at noncompensatory rates, and by the payment of allowances for services which are a part of the commercial activities of those companies. The testimony shows, and it is almost self-evident, that commercial warehousing companies engaged in the storage of automobiles received in carload lots by rail are unable to successfully compete for that business when faced by the competition of the storage companies subsidized by the New York Central. In further discussion of this subject in the prior report, at page 198 we stated:

Certain of the carriers load and unload carload traffic, or make allowances to cover the cost of such loading and unloading for certain shippers, under tariffs or exceptions to the classification. This is contrary to the general practice with respect to carload traffic and to the provisions of the consolidated freight classification. An illustration of this

character is the allowance made by the New York Central to the Auto Storage Company and the Mellish Company for unloading automobiles, including removal of material used in stowing the automobiles in the car. When carriers by [fol. 172] their tariffs extend their service beyond their legal obligation as common carriers, as, for example, beyond a delivery equivalent to team-track delivery, we have ordinarily found that such extra service must be paid for by the shipper in order to avoid preference and prejudice. General Electric Co. v. N. Y. C. & H. R. R., 14 I. C. C. 237; Pressed Steel Car Co. v. Director General, 93 I. C. C. 224, 109 I. C. C. 75; Carnegie Steel Co. v. Director General, 96 I. C. C. 527, 132 I. C. C. 689.

As pointed out in the prior report, the low rental to the Auto Storage Company and Mellish Company resulted in heavy losses to the New York Central. The record is conclusive that the space occupied by those companies is furnished by that respondent at less than the cost to it of providing such space. It is likewise conclusive that the services above described for which allowances are paid, are commercial services not within the New York Central's obligation to perform.

Summary of Principal Findings of Fact

1. The New York Central leases warehouse space to the Mellish Company and the Auto Storage Company, shippers in interstate commerce over said railroad's line, at rental charges which fail to compensate said railroad for the cost of providing said space, thereby assuming a portion of the expense of commercial operations of said companies.

2. Certain other warehouse companies, likewise shippers in interstate commerce over the New York Central are located in the Port of New York district and are competitors of the Mellish Company and the Auto Storage Company. The New York Central does not bear any portion of the expense of conducting the commercial operations of said competing warehouse companies.

3. The New York Central pays allowances to the Mellish Company and the Auto Storage Company for unloading and handling automobiles, which are commercial services not within the obligation of said railroad to perform under its

line-haul rates. Allowances therefor constitute concessions from such rates.

We find that by leasing space at noncompensatory rentals to the Mellish Company and the Auto Storage Company, and by granting allowances for commercial services performed by said companies, the New York Central is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the said warehouse companies in violation of section 3 of said act, and departs from the said railroad's published tariff rates in violation of section 6 of said act.

Pennsylvania Railroad Company

Pennsylvania piers.—The Pennsylvania continues to operate piers described at page 162 in the prior report. [fol. 173] Changes have been made since the issuance of that report with respect to flour traffic and the charges for storage of goods under so-called storage-in-transit arrangements. Both of those subjects are later discussed.

• **Harborside Warehouse Company.**—The Harborside warehouse was originally planned to attract competitive traffic to the Pennsylvania. Although it was not the intention of the Pennsylvania to operate the warehouse directly—and it does not propose to do so in the future—no important part of the planning, financing, refinancing, or operation of the building has been or is conducted except under the domination or at least the direction of the Pennsylvania. The subsidiary companies involved are shown below, and the record is entirely conclusive that the warehouse operations are part of the Pennsylvania's general railroad operations, and, at the most, the former are separated from the latter only by an imaginary line.

The building now occupied by the Harborside Warehouse Company was formerly occupied by the Pennsylvania Dock & Warehouse Company and General Cold Storage Company, and is discussed in the prior report, beginning at page 165. We there found, inter alia, that on August 20, 1929, the Pennsylvania leased to the Pennsylvania Dock & Warehouse Company, hereinafter termed the warehouse company, or the bankrupt company, a parcel of land in Jersey City containing 377,400 square feet, on which

the lessee was to construct a warehouse and cold-storage building at an approximate cost of \$6,756,000 and \$1,780,000, respectively; that the Pennsylvania controlled every important detail in the construction of the warehouse and contributed \$4,116,000 directly to the project, which was constructed on the carrier's land valued at \$1,132,200, the two totaling \$5,248,200; that no rent for the land or interest on the \$4,116,000 had been paid, that other expenditures were made by the Pennsylvania in furtherance of the construction of this warehousing project, namely, for two piers costing \$1,645,000 and \$1,825,000 respectively; that the total investment in connection with these piers and warehousing facilities by the Pennsylvania was approximately \$9,000,000, a large part of which was the expense of removing old facilities to clear the site; and that the warehouse company had been in receivership since July 1931.

We further found that the General Cold Storage Company had operated unit no. 1 of the warehouse building as a cold-storage plant since September 14, 1930, and that although no rent was paid for the use of these facilities after July 16, 1931, that company's income statement for the year ended December 31, 1931, showed a deficit of \$2,247.35; and that although the Pennsylvania denied it had taken any part in the operation of the above companies, and claimed it was not in the cold-storage business, the evidence showed a very close relationship between the operating companies and that carrier.

[fol. 174]. At the further hearing it developed that while foreclosure proceedings instituted by a bondholders' committee were pending, officials of the Pennsylvania conferred with that committee with respect to the situation, and on January 24, 1933, a plan of reorganization of the warehouse company was jointly adopted by that committee, the Pennsylvania, and the American Contract and Trust Company, hereinafter called the trust company, a wholly owned subsidiary of the Pennsylvania. Under that plan a new company, called the Harborside Warehouse Company, Incorporated, was formed to acquire and operate the warehouse. The trust company agreed to provide the new company with an aggregate of \$1,500,000 in cash to pay accrued taxes and expenses of reorganization, to provide working capital, and to absorb losses which under then present conditions it was expected would occur in the operation of the property. For

this purpose it agreed to purchase, or cause its nominee to purchase, from the Harborside Company from time to time, on demand, not exceeding an aggregate of \$1,500,000 of the principal amount of an authorized \$2,500,000 issue of new 40-year 6-per cent leasehold mortgage bonds. In consideration of this the trust company was to receive from the bondholders' committee the entire capital stock of the new company to be outstanding at the completion of the reorganization.

Under the reorganization plan the Harborside Company was authorized to issue \$5,750,000 of 40-year 6-per cent income bonds, junior to the new leasehold mortgage bonds. Holders of the leasehold mortgage bonds of a bankrupt company could exchange their bonds for the new income bonds, or the trust company would purchase or cause to be purchased by its nominee all bonds of the bankrupt company at 35 per cent of their face value. The plan also provided that the Pennsylvania would make an agreement with the Harborside Company to complete, or cause to be completed, the construction of the warehouse and cold-storage plant without cost to the Harborside Company, and that the Pennsylvania would modify or supplement the lease described in the prior report so that the term would extend beyond the maturity date of the mortgage bonds and income bonds of the new company.

The reorganization plan was put into effect; and the reorganization committee purchased for \$2,100,000 at a bankruptcy sale on September 27, 1933, all of the property and assets of the bankrupt company. It also purchased for \$3,500 all of the assets of the cold-storage company. The Harborside Company, whose principal officials are likewise officials of the Pennsylvania, was incorporated in New Jersey on September 30, 1933, and on October 23, 1933, at a meeting of its board of directors, the reorganization committee assigned to the new company all its right, title, and interest in and to its bids at the sale. The board of directors also authorized the issuance of the above-mentioned bonds. The trust company spent about \$1,900,000 in buying some of the first-mortgage bonds of the bankrupt company at 35 cents on the dollar, and secured a loan of about \$1,700,000 in cash from the Pennsylvania before completion of the warehouse. The General Cold Storage Company was dissolved in June 1934.

As a result of the above transactions, the Pennsylvania, through its subsidiary trust company, now owns the building, which was built at a cost of between \$8,000,000 and \$9,000,000. The property was purchased under foreclosure for \$2,100,000, and the Pennsylvania has invested a total of between \$7,000,000 and \$8,000,000 in the project. At the time of the further hearing, suit had been brought by the Pennsylvania to recover \$5,000,000 from the surety company which guaranteed completion of the building by the bankrupt company.

The Harborside Company building, equipped with a steam plant and an extensive refrigeration plant, is now operated as a commercial warehouse. It contains about 1,750,000 square feet of space used for dry storage and about 350,000 square feet used for cold storage. Considerable space of both kinds is used by the Harborside Company for its storage operations, which include all of the incidental services necessary in conducting a competitive commercial-warehouse business. Such space is charged for on a square-foot basis or in some instances according to the weight of the articles stored. The services, such as handling and marking the goods stored, which in most or all cases are owned by shippers in interstate commerce, are charged for on a man-hour basis. The warehouse does not operate a distributing or trucking service, but will arrange for such service for its customers. No pool cars have been handled to the present time, as at some other railroad owned or controlled warehouses in New York, for the reason that the Harborside Company has not considered that business desirable. Space is also rented on a square-foot basis to tenants, most or all of whom are also shippers in interstate commerce, whose business necessities require them to store, manufacture, blend, pack, or perform a similar trade process on the goods handled.

During the life of the National Recovery Administration the storage operations of the warehouse were conducted in accordance with the warehousemen's code, and the basis for charges under the code were continued to the time of the further hearing. While it does not appear from the record that this respondent has indulged in price cutting on storage or space rented to the same extent as other respondents, it is clear that under some circumstances it engages in [fol. 176] practices which offer opportunities to defeat requirements of the act. Among such practices are altera-

tions made in space rented to shippers in order to fit the needs of the particular business in which the shipper engages. Free rental for a period of time at the beginning of a lease term is in some cases allowed, the amount of time for which no rental is collected apparently being governed by the desirability of the tenant from a landlord's standpoint. While it is not customary to do so, in one instance of record money was advanced to shippers to pay general freight and customs charges, and in several instances charges for storage were not collected when due. In those cases respondent claims to have been amply secured because the value of the stored goods was greatly in excess of the past-due storage charges.

Under the above circumstances, the extent of the services performed by the Pennsylvania for its shipper tenants must vary from time to time, and as a result the compensation received by that respondent for a given service likewise varies. Such arrangements are contrary to the principles of the act.

The rates charged for rented space such as has been previously discussed range from 40 to 70 cents per square foot per annum. It was testified on behalf of the respondent that in fixing the rates for storage and rental the out-of-pocket costs were obtained, but it was developed that such costs did not take into account charges for depreciation on the building or on the refrigerating and similar machinery used in conducting the operations. The value of the building is carried on the books of the Harborside Company as \$7,350,000. An exhibit of record shows that the net income of the Harborside Company for the seven months' period ended April 30, 1935, was \$18,800.71. If depreciation at 2 per cent on the book value of the building had been charged a net loss of \$66,949.29 would have resulted. The reason advanced for the failure to include depreciation as an element of cost was that the property was acquired by the Pennsylvania at a price far below its real value and capitalized in such a way that it was unnecessary to take into account a depreciation charge.

We cannot too strongly condemn such accounting methods when used by carriers subject to the act to arrive at costs of services sold to shippers, the value of which affects or determines the charges for transportation. In Winston-Salem Southbound Ry. Co., 84 I. C. C. 581, 583, we said:

Depreciation has been defined by us as the "lessening in worth of physical property due to use or other causes." Each of the components of perishable property must at some time end and as each unit ages, its service capacity also lessens in value. Potential use is limited or curtailed by the length of time property or any of its parts has seen service and a consequent diminution in value ensues.

[fol. 177] We have likewise held that the service life of any piece of property which is subject to depreciation begins to decrease from the time it is put in service. *Augusta N. Ry.*, 125 I. C. C. 14. It is unnecessary to cite further cases to support these statements.

Summary of Principal Findings of Fact

1. The Pennsylvania, through a wholly owned subsidiary, owns and controls the Harborside Warehouse Company. No important activity of the Harborside Warehouse Company is conducted except under the domination, or at least the direction, of the Pennsylvania officials.

2. The Harborside Warehouse Company is engaged in the commercial-warehouse business. It and other warehouse companies in the Port of New York district compete for the storage of goods transported in interstate commerce by the Pennsylvania.

3. The Pennsylvania does not set up as an element of the cost of operation of the Harborside Warehouse Company the depreciation charges on the building it occupies. Depreciation is one of the elements of cost in the operation of a warehouse.

We find that in determining the out-of-pocket costs of providing warehouse space for shippers in interstate commerce the Pennsylvania must take into account as an item of expense the depreciation on its warehouse buildings and facilities used and owned directly or indirectly by it, and that failure to take into account all proper costs in providing warehouse or storage space for shippers in interstate commerce constitutes a device to provide such space at less than cost, and thus evade the provisions of sections 2, 3, and 6 of the Interstate Commerce Act.

Storage of Eastbound Carload Freight at New York

This subject is discussed in the prior report at page 140, and need not be further dealt with except in connection with flour, which as is there shown, is given special treatment. That commodity is further referred to in that report in connection with practices of individual respondents, and the arrangements under which it is at present stored are next discussed.

A large tonnage of flour is received by rail at the Port of New York, and is there held for distribution throughout the thickly populated surrounding sections. Storage of such flour is therefore a commercial necessity, and a large reserve supply must be at all times available. Flour is desirable traffic from the respondents' standpoint, and there is intense competition between them for its transportation. Under such circumstances the dealers and persons interested in the handling of flour have been, and are, able to secure [fol. 178] concessions for storage, which reduce, and in some cases nullify, their cost for that trade necessity, and the respondent carriers have willingly or unwillingly assumed the burden of the storage expense. Such assumption has been brought about largely through the leasing of space in railroad owned or controlled warehouses, which permits the lessees who are dealers in flour, or are otherwise interested in its distribution, to avoid payment of respondent's published tariff charges for storage in their premises. These tariff charges are shown at page 140 of the prior report, where the storage of flour is discussed. The fact there mentioned that flour is consigned for official inspections seems to be of minor importance in the light of the surrounding circumstances.

In general, the leases provide for low monthly rental on a square-foot basis. The space so leased is in many cases not separated from the remaining space in the warehouse where goods are stored under tariff rates, but is designated only by painted lines on the warehouse floor. It is pointed out in the prior report at page 152 that in many instances the lessees of such space are parties who have no interest in the flour itself, but only in the trucking, lightering, storing, or stevedoring thereof. In some cases excessive allowances have been paid for the handling of flour to parties such as last mentioned, which arrangements offer a fertile source for avoiding the provisions of the law. The record

is conclusive that through existing arrangements the respondents have provided flour-storage space at less than cost. In fact, it was testified at the former hearing that, through the practice of respondents in leasing their storage facilities to trucking or stevedoring companies, it is possible for flour merchants in New York City to avoid bearing any expense for such storage. Under such circumstances it is of course clear that the operators of commercial warehouses are unable to compete successfully for the business of storing flour. Those operators are "persons" within the meaning of that word as used in sections 2 and 3 of the act, and must be dealt with in accordance with the provisions of those sections. Carriers may not adjust their transportation rates with the motive of injuring or aiding a shipper or a particular description of traffic, or publish tariffs for the purpose of diverting traffic from a particular place or shipper in aid of other places or shippers, which bring about violations of the act. *Texas & P. Ry. Co. v. United States*, 289 U. S. 627, 637. Likewise they may not lawfully assume or bear the cost of commercial activities, or any portion thereof, by which unjust discrimination and undue preference results.

Since the prior hearing, the leasing of space and arrangements for handling of flour have had the consideration of various committees of respondents. The New York Central [fol. 179] canceled its arrangements whereby stevedoring and handling of flour were performed for it by other than its own employees. That respondent recommended to one of the committees above mentioned that in order to correct the practices with respect to leasing, as criticised in the prior report, all leases should be canceled, and in the latter part of 1933 did in fact cancel its own leases, although this action was later rescinded. The respondents' general committee seems to have recognized that many of the practices in connection with flour storage were indefensible, and recommended that such lease be canceled as to parties interested only in the trucking and handling or similar services. This recommendation, while it would not have gone far enough to comply with the findings in the prior report, was defeated by the opposition of the Lehigh Valley. The record on further hearing indicates that the New York Cen-

tral has taken steps to cancel its leases to flour dealers effective July 31, 1935.

Illustrative of practices which have grown out of the leasing of space to flour handlers is a condition disclosed in connection with such leasing to the United Flour Trucking Corporation by the New York Central at its Port Morris station. The space at Port Morris which is available for lease, while considerable in amount, is insufficient to permit the flour handled by the flour corporation to be unloaded and stored promptly upon receipt at New York City. The result is that the flour is held in cars until space is available for unloading. Inasmuch as the New York Central tariff provides for unloading of such freight in the facilities they have available, the cars are held at the so-called "convenience" of the carrier, because of the latter's inability to provide space to the consignee, and no demurrage on the cars is paid. Through this device the lessee-consignees receive unlimited use of railroad cars free of charge, while respondent at the same time bears either the cost of ownership for its own cars or per diem cost for cars owned by other carriers. On June 19, 1935, 57 cars of flour were so held, and the average time of their detention was 15.2 days. While detailed testimony with respect to this practice relates only to the New York Central, it was further testified that it was typical of such leasing arrangements throughout the Port of New York district. It appears that in instances as above described, the effect of the tariff providing for leasing of space for the storage of flour nullifies the application of the tariffs which provide for collection of demurrage on cars held by shippers or consignees.

Another outgrowth of the leasing of space for the storage of flour is the practice of delivering shipments of that commodity to the lessees of such space without requiring sur-[fol. 180] render of the order-notify bill of lading under which such shipments move, and the failure of respondents to collect the freight charges due on such shipments when the flour is delivered. Under such arrangements the flour remains in storage for indefinite periods and surrender of the bill of lading and collections of freight charges are not made until the lessees remove the flour. The respondents attempt to justify the practice by contending that, while the flour technically passes out of their control when it is stored in the leased space, it is nevertheless still subject to their supervision, as it would be impossible for the lessee to re-

move the flour without such fact being brought to the attention of respondents by their forces in charge of the space in connection with general warehouse duties. Such contention is without merit, as one of two courses must be followed with respect to such delivery. If the flour is not in fact delivered by respondents, the regular tariff storage rates applicable to all shippers must be collected, whereas if delivery be actually made by respondents the bill of lading must be taken up and the freight charges collected. Despite their claim that they are justified in such practices, respondents, shortly before the further hearing, agreed to discontinue delivering shipments of flour to lessees of warehouse space and to noncollection of freight charges at the time of delivery, the new arrangements to become effective July 12, 1935, only a few days after that hearing closed. We are without knowledge as to whether such practices have actually been discontinued. Even if they have, it would correct only a part of the practices with respect to flour storage, which are clearly shown to violate certain provisions of the act.

We find that the leasing of space to shippers for storage of the particular description of traffic here involved, which results in such shippers paying a lower storage rate than that charged other shippers for space identical in all respects, constitutes a device whereby respondents engage in unjustly discriminatory and unduly preferential practices forbidden by sections 2 and 3 of the act. The space here discussed is leased from respondents and used for storage which is a necessary and component part of the commercial activities in connection with the handling and distribution of flour. This storage is not a part of transportation as defined in the act. The space, therefore, is not such as is properly the subject of tariff publication, but must be governed by the principles announced in Leases and Grants by Carriers to Shippers, *supra*; Cf. Wharfage Charges at Atlantic and Gulf Ports, 157 I. C. C. 663, 691. Respondents by paying for or assuming the cost of such commercial service, depart from their published transportation rates and charges in violation of section 6 of the act.

[fol. 181] Storage of Westbound Carload Freight at New York

At page 141 of the prior report we discussed the practices of respondents with respect to the storage of westbound

traffic under so-called transit arrangements and the rates applicable to such storage at the time of that hearing. Effective June 1, 1933, after the hearing and issuance of the examiner's proposed report, the rates were revised to include handling on westbound traffic, and were increased on certain commodities to the basis shown on page 194 of the report. The increases affected not only New York, but Philadelphia, Pa., Baltimore, Md., and Norfolk, Va. They did not, however, apply to crude rubber and wood pulp, which commodities amount to approximately 75 per cent of the westbound freight stored at the Port of New York. In 1933, out of a total of 257,867 tons of commodities so stored, 152,746 tons consisted of crude rubber, and 33,570 tons of wood pulp. The increases did not affect storage on china clay, but this storage is not conducted in warehouses, and is of minor importance at New York.

Solely for the reason that a great percentage of the westbound goods stored at the Port of New York under the respondents' so-called in-transit tariffs consist of crude rubber and wood pulp, and because much of the testimony on further hearing related to these commodities, our attention will be directed to the failure to increase the storage rates on those commodities. Our discussion of those commodities herein is only illustrative as the record is clear that those and other commodities are stored under circumstances which are not bona fide transit arrangements necessarily related to transportation services which it is the duty of the respondent carriers to perform. The circumstances and practices referred to are a part of the business necessary in conducting a commercial-warehouse enterprise. The engagement by the carriers in commercial warehousing under circumstances described of record, affects the performance of their common-carrier duties and is of such character as to result in violation of the act which we are charged with administering. Prior report page 195. About 50 per cent of the crude rubber imported through the Port of New York consists of so-called "licensed rubber," sold on the rubber exchange, none of which is stored in railroad-owned or controlled warehouses. Of the remaining 50 per cent, a considerable amount does not go into storage at New York, but is shipped directly from shipside to destination. The portion stored in respondents' warehouses is owned either by manufacturers, or by rubber dealers and brokers.

Goods, including rubber, stored under the so-called transit tariffs, are unloaded from shipside and moved to warehouse [fol. 182] houses under local rates. The goods remain in storage under so-called "expense bills." If shipped out-bound from storage within the transit period, a refund is made of the local inbound freight charges, since the same through rate applies from shipside as from the warehouse. In spite of the fact that the storage of large quantities of certain of those commodities at the Port of New York was shown in the prior report to be a burdensome expense upon them, the respondents after the first hearing adopted the practice of extending the expiration date of the expense bills, thereby allowing the freight to remain in storage under the transit rates for longer periods than previously permitted. The reason given for this extension is that because of the generally depressed condition of business, the owners of freight stored under the transit arrangements are unable to sell their commodities and move them from the warehouses.

The time limits were generally extended for 6-month periods, and through such practice it was possible for crude rubber to be stored a maximum of 30 months, unmanufactured tobacco 36 months, paraffin wax 24 months, and burlap, pig tin, cocoa beans, pepper, and senna leaves 18 months. The respondents filed schedules to become effective April 1, 1934, extending the time limit to 36 months on crude rubber, but those schedules were suspended by us in I. and S. Docket No. 3972, and were later withdrawn by respondents and the proceeding discontinued. The expiration date on pepper and senna leaves has not as yet been reached. On May 20, 1935, however, the carriers extended the time limit an additional six months on expense bills covering paraffin wax. The above limits represent the time which the goods may remain in storage and receive the advantage of the through rate from shipside to destination. If the goods remain in storage for longer periods the storage rates remain the same, but the shipment is considered a local shipment from the transit point.

When the prior report was issued, respondents' tariffs permitted the removal of commodities stored under transit storage rates at any time, in any quantity, and by any means of transportation. Effective October 16, 1934, a charge of 5 cents per 100 pounds in addition to the accrued storage-

in-transit charges was made to apply on commodities withdrawn from storage for movement by means other than over the railroad which granted the storage.

In appendix III to the prior report the loss per ton on freight stored under the in-transit tariffs by the trunk-line respondents during the year 1931 in the Port of New York district is shown. The losses range from \$1.28 to \$6.18 per ton and then, as now, a large percentage of the tonnage stored consisted of crude rubber. In most cases it is not contended on this record that the rates under the in-transit [fol. 183] tariffs compensate the carriers for the cost of storage and handling. No pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory, and one prominent traffic witness for respondents, when asked if he knew the out-of-pocket loss incurred in the storage and handling of crude rubber testified, "I know that those things do not in themselves pay for handling the traffic." This witness in effect admitted that the storage costs, without considering the handling costs, exceed the revenue received from the two services. Generally speaking, the respondents' position with reference to storage of westbound crude rubber is that by furnishing the storage some business is obtained for their lines which would otherwise not move thereover. While recognizing that the amounts received for the handling and storage do not equal the cost of those services, they attempt to justify the present practices by claiming the right to offset the storage, handling, and insurance losses against the line-haul revenue. Their position in this respect is directly contrary to the principles announced at page 201 of the prior report.

We have previously shown in connection with the Lehigh Valley that on crude rubber stored in its warehouse at Claremont, N. J., for 20 months, the storage and handling costs exceed the divisions of the rates received. A witness for the Baltimore & Ohio introduced an exhibit showing the net revenue per ton received on rubber transported by it during the period from July 1930 to April 1935. The exhibit does not take into account the cost for transporting the freight from New York to destination. It shows that on 148,129 tons of rubber not placed in storage but moved directly from shipside to destination, the Baltimore & Ohio's division of the total line-haul revenue was \$5.29 per ton. It had left from its division received on 107,823

tons of rubber stored in New York \$2.84 per ton. The difference between these figures, \$2.45, represents a loss to the Baltimore & Ohio from storing and handling the goods, or expressed differently, cost incurred in performing commercial service on the rubber. The desire of respondents to obtain traffic for their lines clearly results in concessions and departures from their published rates prohibited by the act. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission, supra.*

Various reasons were advanced by witnesses for respondents for their failure to increase storage rates since the issuance of the prior report. These reasons have all been considered by us. They are practically the same as those originally given for the low basis of storage rates, the principal one being the fear of loss of business to other ports and to other forms of transportation. In 1930 the [fol. 184] movement of crude rubber by barges and trucks from New York to Akron, Ohio, was a matter of grave concern to the respondent carriers, and they gave serious consideration to the means they felt should be employed to retain the then existing traffic and secure additional traffic for rail movement. Individual and joint conferences with the large rubber manufacturers located at and in the vicinity of Akron resulted in a so-called "gentlemen's agreement", the effect of which was a reduction by the rail carriers in the rate on crude rubber from New York to Akron from 47 to 40 cents per 100 pounds, effective March 1, 1931, and a reduction in rates on motor-vehicle tires from Akron to New York. In turn, these rubber manufacturers agreed to move their shipments by rail, and this agreement is being complied with. However, considerable rubber has moved by canal or truck to points other than Akron. Witnesses for respondents contend that an increased storage rate, with resultant higher cost for movement from ship-side to destination, would break the "gentlemen's agreement", and that the rubber manufacturers would then be free to use competitive forms of transportation. The record supports the conclusion that shippers of rubber and wood pulp who use storage facilities owned or controlled by respondents were of sufficient importance from a traffic standpoint to successfully resist the imposition of higher storage rates, while shippers of many other commodities were compelled to pay greatly increased storage rates in

railroad owned or controlled warehouses or to seek other storage facilities. The record is not convincing that it would be advantageous to shippers to divert a substantial amount of rubber or other traffic through other ports or to other forms of transportation if the storage rates on such traffic should be increased. In any event, fear of such diversion would not justify respondents in violating any provision of the Interstate Commerce Act.

Application of import rates and lighterage charges.—It was testified that respondents' efforts to attract traffic to their warehousing facilities have become intensified since the prior hearing. Since January 3, 1932, lower class rates have applied from New York and other north Atlantic ports on import and interoceanic traffic than the rates applicable on domestic traffic. The lower rates can be taken advantage of only when the freight is shipped immediately from the vessel, from bonded warehouses, from appraisers' stores within a 12-month time limit, or from railroad warehouses as to which no time limit is specified in the tariff. Except in connection with the Norfolk and Western Railway Company and the Virginian Railway Company the provision governing the application of the import rates is as follows:

[fol. 185] Rate named herein apply on property received from foreign countries—when arriving at origin stations named on pages 7 and 8, by vessel and delivered to the rail carrier direct from ship's side or dock of vessel bringing such property to origin stations named—, or on such property received by the rail carrier from customs bonded warehouses or appraisers' stores (not internal revenue stores), within twelve months from date of entry, or initial carriers' stores, provided same has not been trans-shipped at any other United States port.

The tariffs of the Norfolk & Western and Virginian contain similar provisions as above except that they also include public warehouses. The above provision, except in connection with the two carriers named, therefore, does not permit a shipper to import traffic and store it in commercial warehouses, unless such warehouses are bonded (which ordinarily they are not) and upon reshipment avail himself of the low import rates. On the other hand, while few if any of the railroad owned or controlled warehouses are

bonded, the lower rates are available to shippers whose goods are stored in any of these facilities.

We have in a number of cases recognized the right of carriers to maintain rates and practices in connection with import traffic differing from those on domestic traffic, and have held that such an adjustment is not of itself unlawful, but that the question of whether or not undue prejudice exists is one of fact to be determined by considering whether the circumstances and conditions controlling the rates or practices on import traffic are dissimilar to those surrounding the rates and practices on domestic traffic. It is shown that a charge of 50 cents per net ton for loading to or unloading from lighters in New York Harbor has recently been imposed on domestic freight, but is not applied on import freight.

Under the above tariff provision, goods stored in unbonded commercial warehouses lose their identity as import traffic, and the lighterage charge is therefore imposed on practically all freight stored in warehouses operated in competition with those owned or controlled by respondents. The imposition of the domestic freight rate and the lighterage charge on freight stored in commercial warehouses naturally attracts traffic to the railroad storage facilities. As we observed in the prior report at page 200, "The private warehouse companies are 'persons' within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the charges which they are required to pay and the treatment they are accorded by carriers subject to the act, are subject to the provisions of these sections, as well as the provisions of the Elkins Act. Compare *Merchants Warehouse Co. v. United States*, supra."

We find that the practices discussed in the preceding paragraphs result in unjust discriminations, undue preferences [fol. 186] on particular descriptions of traffic, and the assumption of commercial storage expenses of certain shippers in violation of sections 2, 3, and 6 of the Interstate Commerce Act.

Loss in handling and storage under so-called in-transit arrangements.—The engagement of the respondents in commercial warehousing under so-called in-transit tariffs, as pointed out in the prior report, has resulted in serious monetary losses to respondents. Respondents have for several years recognized that the charges for the warehousing

ing services and space furnished under the transit arrangements are not compensatory. Since some changes in those charges were made following the prior hearing, it is necessary that we again consider the losses to the respondents which result from the storage and handling practices.

In the prior report we said that the charges, direct or indirect, for storage or warehousing or for services rendered in connection therewith, must, in order to avoid violations of the act, be put on a basis which, entirely independent of freight rates, would reimburse respondents for the full cost of such services. Early in 1934, shortly after the issuance of the above-mentioned report, the respondent carriers jointly attempted to determine the cost of storing and handling the commodities stored during the year 1933. Each respondent compiled figures showing the cost including interest, maintenance, taxes, insurance, watchman, overhead, light, power, and incidental items on the portion of the various warehouse facilities used by it for storage. The 1933 ledger value of the structures was used. No allowance was made for depreciation, and other items which, if proper accounting methods were used, should have been included, were omitted.

An exhibit compiled from that cost study shows the cost of storing and handling numerous commodities during 1933. The average cost to all respondents for a total of 37,635 tons consisting of coffee, cyanide, sugar, ivory nuts, tin, senna, pepper, tapioca flour, soap, ground peat, palm istle, cocoa beans, hemp, paraffin wax, paint, bran, and burlap was 71 cents per ton per month. The cost for storing 28,279 tons of other commodities not specifically named, was \$1.1226 per ton per month. The average cost of handling per ton was 44 cents, making the total cost of storing and one handling \$1.15 for the commodities specifically named above, and \$1.5626 for those not named.

It is, of course, apparent that the length of time the commodities remain in storage affects the cost to the respondents. For example, the average monthly cost of storage on the commodities named was 71 cents per ton. To this must be added 44 cents for the cost of handling when the goods were first stored. If they were removed within 30 [fol. 187] days another handling charge of 44 cents would be borne by the carrier, making a total cost to the latter of \$1.59. Practically all of the commodities here considered fall within the classification carload minimum of 24,000

pounds or higher, and for such commodities the shipper would pay for storage and handling \$1.20 per ton. If such goods remain in storage longer than 30 days the cost to the carrier for the second month would be 71 cents, while the shipper would pay the storage rate of only 60 cents. So far as the storage alone is concerned, it is apparent that the monthly loss incurred by the carrier would continue indefinitely so long as the goods remain in storage.

Inasmuch as the storage above discussed does not include crude rubber or wood pulp, and those commodities compose by far the largest proportion of the tonnage stored, the losses in connection therewith should be reviewed separately. The joint cost study of respondents shows that among the westbound commodities stored during 1933, there were 152,746 tons of rubber. The average cost per month of such storage was 50.46 cents per ton. The average cost for each handling was 44 cents per ton. The tariff charge for storage was 30 cents per ton for the first 30-day period or less, and 10 cents per ton for each succeeding 15 days or fraction thereof. The tariff charge for loading and unloading freight to and from cars was 20 cents per ton for each handling. When rubber was stored for one 30-day period, and two handlings were necessary, the average cost to respondents was \$1.3846 per ton. The tariff charge for the storage and handling was 70 cents per ton, which resulted in loss of 68.46 cents for each ton so stored and handled. For the second 30-day period and each succeeding such period that the rubber was stored, when no handling was necessary, the average cost per ton to respondents was 50.46 cents, and the tariff charge was 20 cents, representing a loss of 30.46 cents per ton.

The above study shows that 33,570 tons of wood pulp were stored at an average cost per month of 55.7 cents per ton and that the average handling cost was 44 cents. The tariff charge for storage for each 30-day period after the 15-day free period was 15 cents per ton, and the tariff charge for loading and unloading to and from cars was 20 cents per ton for each handling.

The handling cost varies in the case of individual respondents and the total cost of handling depends largely on the location of the facilities used for storage. In some instances those facilities are located directly on the water front, which permits the commodities to be unloaded directly from the vessels or lighters. In such cases one extra hand-

ling cost to the carrier, when the goods are handled for out-bound shipment, is incurred over the amount that would be [fol. 188] incurred if the commodity were loaded directly into cars for shipment. In other cases, and this is true of a large portion of the traffic, the commodities are unloaded from vessels or lighters into cars which are then switched at additional expense to warehouses located away from the water front, unloaded into the warehouses, and upon removal from the latter are loaded into cars for shipment. It is clear that in such cases the goods must be handled three times from the time they are unloaded from the vessel until they are ready for final shipment, and that two of such handlings are necessary because of the fact that the goods are stored under the in-transit arrangement. The cost of the two extra handlings is borne by the carrier and not by the shipper, although it is to the latter's commercial interest to avail himself of the storage facilities.

Commercial nature of storage here involved.—Numerous consuming points of the commodities previously mentioned are located within comparatively short distances from the Port of New York district. Present-day commercial necessities in the distribution of goods to a densely populated section require large amounts of warehouse space as a storage reservoir from which the goods may be drawn promptly and economically for consumption. It is distinct commercial advantage to dealers and manufacturers to have storage facilities available at a central distributing point, rather than at scattered points, and commercial reasons account for the large tonnage of goods stored in the above district.

Involuntary storage is a part of the transportation service defined in section 1 of the Interstate Commerce Act. Other storage, voluntary or commercial in nature, is not included within the term "transportation" as there used. Prior report, page 139. Where it is sought to distinguish between two things which have qualities inherent in both, the use of single words or short phrases which do not draw the distinction precisely frequently leads to confusion of ideas. There are many services and acts, including storage and handling of goods, which are necessary in or incidental to the conveyance of goods by rail from one locality to another, which are not a part of transportation as defined in section 1. A clear distinction should be made between voluntary or commercial storage ordinarily performed by a warehouse, and

the involuntary storage which carriers subject to the act are obligated to perform. *State v. Southern Pac. Co.*, 52 La. Ann. 1822, 28 So. 372. Our duty, under the circumstances here involved, requires us to determine when transportation as defined in the act begins and ends, and to determine whether acts or services incident to the conveyance of goods from one point to another are or are not a part of transportation which common carriers subject to the Interstate [fol. 189] Commerce Act are obligated to perform. Such matters are questions of fact.

The business of a railroad is transportation, not storage. *Demurrage Investigation*, 19 I. C. C. 496. Storage of property transported is a transportation service only to the extent that the storage is necessarily incidental to transporting such property, and the term is used in section 1 in that limited sense. *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169.

We pointed out in the prior report that ordinarily the transit privilege granted in connection with the transportation of goods is for the purpose of permitting milling, manufacturing, or similar processing of the goods. The underlying principle of all transit arrangements is that the same commodity which moves to the transit point shall move therefrom in a more or less changed form. *Maley & Wertz v. Louisville & N. R. Co.*, 36 I. C. C. 657. The holding or storing of the goods, therefore, is incidental to the main or primary purpose of performing the milling, manufacturing, or similar process.

So far as this entire record shows, none—or practically none—of the westbound goods stored under the present tariffs are held to permit a milling, manufacturing, or other similar trade process to be performed, but are held in that convenient locality awaiting a time when it will be to the commercial interest of the owner to sell or further ship the goods. This is clearly proven by the fact that the transit period has been extended from time to time by the respondents because of inability of the owner of the goods to dispose of them, by reason of economic conditions. The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function. *Reconsignment and Storage of Lumber and Shingles*, 27 I. C. C. 451.

The transit privilege permits the stopping of goods at an intermediate point between the point of shipment and final

destination, and the reshipment from the intermediate point at the through freight rate, lower than the combination of local rates which the shipper would otherwise pay. The privilege is of great importance to many shippers and its commercial necessity has long been recognized. We are not to be understood as condemning bona fide transit arrangements, but only the practices here considered by which the carriers, through stress of competition, have assumed by tariff publication a part of the costs of strictly commercial storage and handling of goods. *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, 257. The assumption of such costs defeats the published freight rate and is necessarily unjustly discriminatory and unduly preferential. *New York, N. H. & H. R. Co. v. Interstate Commerce* [fol. 190] Commission, *supra*; *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 33, citing *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155.

The fact that the carriers' tariffs designate the storage as in-transit storage was considered in the prior report, but we found that such designation did not invest this storage with the characteristics of storage in transit. Tariffs are but forms of words, and in administering the act we can look beyond the forms to what causes them, and what they are intended to cause and do cause. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 225 U. S. 326. It is fundamental that where an unlawful practice is being worked, the mere fact that the machinery for working it is in tariff form cannot afford it sanctity. *Gallagher v. Pennsylvania R. Co.*, 160 I. C. C. 563; *Merchants Warehouse Co. v. United States*, *supra*.

In some isolated instances the rates for storage and incidental services on certain commodities may not result in losses to the re-pondent. Those instances are dependent on the place of storage, the number of handlings necessary in connection therewith, and the length of time storage space is occupied. The fact that some persons pay compensatory rates for the storage of their goods, while others do not, proves rather than disproves violations of the act.

The consideration upon further hearing given to storage, under the tariffs now effective, in railroad owned or controlled warehouses, of the commodities which have been mentioned in this report under the heading *Storage of West-bound Carload Freight at New York*, and others not specifically named herein, but similarly stored as described of rec-

ord, leads us to affirm our previous findings and to here find that, to the extent that the respondents engage in the storage of those commodities under the practices heretofore discussed, those respondents have departed from the business of transportation and entered the business of commercial warehousing.

Violations of act resulting from respondents' engagement in commercial warehousing.—It was urged on behalf of the complaining warehousemen that the engagement of the respondents in the business of commercial warehousing would ultimately drive such warehousemen out of business, and result in a monopoly by the respondents of commercial warehousing in the Port of New York district. There appears to be a basis for their fears, but the act which we are required to administer does not directly deal with such matters. We are concerned only with violations of the act which occur by the engagement of the respondents in the commercial storage of goods. The question for determination, therefore, is whether the respondents by engaging in the business here considered, which is not transportation, violate any section or sections of the act.

[fol. 191] In *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, supra, the court enjoined the Chesapeake & Ohio Railway Company from violating sections 2, 3, and 6 of the act as a result of that carrier's selling coal at less than the cost of purchasing and delivering it, plus the carrier's transportation charges. It is established beyond doubt that each of the respondent carriers, in attempting to stimulate traffic for its line, under the guise of storage-in-transit tariffs, provides commercial storage and handling to certain persons for less than the cost of those services. The respondents thus reduce the transportation rates to such persons to the extent of the difference between the sale prices of the storage and handling and the cost thereof.

In the above-cited case the court said with reference to section 2 of the act: "The all-embracing prohibition against either directly or indirectly charging less than the published rates, shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." If the sale of coal by a carrier for less than the cost of the commodity, which thereby reduced the transpor-

tation charges thereon, resulted in violation of section 2, it necessarily follows that the sale of storage and handling at less than the cost of those services, which reduces the transportation charges on goods between shipside and destination, likewise results in violation of that section.

In the instant case it is established that those persons who are able to avail themselves of storage and handling at the carriers' noncompensatory rates, and whose costs from shipside to destination are thereby reduced by the amount of the difference between compensatory rates and the noncompensatory rates, receive an undue and unreasonable preference or advantage over those persons whose commercial practices will not permit of their placing their goods in storage at New York, but require direct shipment from shipside to destination. Not only is the latter class of persons unduly or unreasonably prejudiced or disadvantaged, but such prejudice and disadvantage extends to all persons who are compelled to bear the carriers' transportation rates which are dissipated by their storage practices. The provisions of section 3 conflict with the asserted rights of the respondent carriers to deal in the storage of commodities which they transport, and in such dealing to sell their storage at a price less than the cost of that service.

In considering section 6 of the act, it must be recalled that in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, supra, the carrier was enjoined from reducing its published freight rates by dealing in the purchase and sale of coal. In the instant case, the carriers sell [fol. 192] warehousing services at less than the cost of providing them and absorb the resulting loss in their transportation revenues. Through the publication of tariffs by which they hold themselves out to store and handle goods in their warehouses at noncompensatory rates, the carriers in effect reduce their line-haul rates from shipside to destination on traffic stored in their warehouses. The carriers assume a portion of the cost of commercial warehousing which should be borne by the shippers as a part of the expense incidental to the conduct of their business, and by this device work departures from their tariff rates, in violation of section 6 of the Interstate Commerce Act.

Insurance

The matter of insurance for loss or damage by fire on freight held under the so-called transit arrangements is

discussed in the prior report at page 142. The facts relating to insurance upon which that discussion is based were fully developed in the previous record, and no attempt has since been made to disprove them.

The rates for insurance are dependent upon the nature of the commodities and the type of building in which they are stored. Some of the buildings considered on the record, such as piers, owned or controlled by the respondents, are so located and constructed that only a very high insurance rate can be obtained on goods stored therein, while at other modern and fireproof warehouses a very low rate is obtained, in some cases as low as 6 cents per \$100 declared value per annum. In the prior record it was shown by a witness for the complaining warehousemen, experienced in rating property for coverage by fire insurance, that reasonable rates for insurance on commodities stored on railroad owned or controlled piers at Hoboken and other points on the New Jersey side of the river ranged from 15.3 cents to \$1.58 per \$100 declared value per annum, based on 80 per cent of the value of the insured property. In some instances, as shown on page 142 of the prior report:

Some respondents protect the liability they assume by obtaining fire insurance from regular insurance companies, and in so doing incur a loss equal to the difference between the 8-cent rate they receive and the higher rate which they pay to the insurance companies. It appears that in some cases the liability is assumed without reinsurance.

After the issuance of the prior report the respondent carriers, through a committee, gave consideration to the subject of insurance. That committee reported to the executives that "as a competitive matter it is necessary that the insurance rates in the warehouses of all railroads be substantially the same." In its report reference was made to the fact that the 8 cents per \$100 of value—

[fol. 193] is much below the rates ordinarily prevailing for such insurance, and in instances where the carriers reinsure they are compelled to pay a higher rate and bear the difference. This raises a legal point as to whether the carrier which insures may relieve itself of risk by reinsuring, or is required to carry its own insurance. It is therefore recommended that this matter be referred to a committee of counsel.

No reason for such insurance practices appears, except the competitive feature above mentioned. No steps have been taken, since the report of the committee was made, to comply with the findings contained in our prior report that the practices should be corrected because of resulting violations of the act. The rental by a carrier of its property to shippers for less than the reasonable market rental violates the provision of the Elkins Act, which forbids the giving or receiving of "any rebate, concession or discrimination in respect to the transportation of any property in interstate . . . commerce," and likewise the provisions of section 3 of the Interstate Commerce Act. *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, supra. It cannot be doubted that to the extent that a shipper escapes payment of a reasonable storage or insurance rate there is a deduction from the sum of the transportation rates paid on shipments of freight stored and insured, if the shipments are transported over a carrier's railway. *Central of Georgia Ry. Co. v. Blount*, supra. Loans of money by carriers to shippers at less than the prevailing rate of interest are unlawful. *Vandalia R. Co. v. United States*, 226 Fed. 713.

While a traffic official of the Baltimore & Ohio reported to his superiors that: "The comments of the Commission with respect to the assumption of liability by the carriers for actual loss or damage by fire at the rate of 8¢ per \$100 per annum are indisputable, and while we are reluctant to do so, we feel obliged to recommend that the practice of equalizing insurance be discontinued," it was testified that that respondent has made no change in its insurance practices. It therefore continues to bear the losses as discussed on page 151 of the prior report.

The Erie has made no change in its practices with reference to insurance since the issuance of our prior report. That respondent has important storage facilities on which the insurance rates are 6 cents per \$100 of value per annum. The record indicates that on other facilities where goods insured by the Erie are stored, the insurance rate is considerably above 8 cents per \$100 of value per annum, but it is not clear as to whether or not the Erie reinsures the freight with insurance companies.

The insurance practices of the Lackawanna have not been changed since the issuance of the prior report in which they [fol. 194] are referred to at page 172, as follows: "The Lackawanna publishes an insurance rate of 8 cents per \$100

of value applicable to freight in storage, and covers its liability by reinsuring at a rate of 35 cents per \$100 of value per annum." That statement refers to insurance on storage at piers, but like the Erie, one of the Lackawanna's most important storage facilities is a modern warehouse where the insurance rate is 6 cents per \$100 of value per annum.

The Lehigh Valley has made no change in its insurance practices since our prior report. A witness for that respondent testified that he would favor reducing the insurance rate from 8 cents to 6 cents to compete with the Erie and Lackawanna. As of June 1, 1935, the Lehigh Valley had in storage commodities valued at \$1,114,028. That respondent does not reinsure with insurance companies, and has had to pay no losses.

The New York Central has made no change in its insurance practices since the prior report was issued. That respondent does not reinsure the property, but itself assumes the risk of loss. In June 1931 it paid a claim of \$5,382 for damage by fire on 10,000 bags of stored sugar. At the time of the further hearing, the amount of its insurance covered by the 8-cent rate was \$87,877.

The insurance practices of the Pennsylvania are discussed in the prior report at page 164. It is there shown that certain Pennsylvania officials doubted the legality of equalizing the insurance rates, but that this respondent later reluctantly became a party to the arrangements in order to meet competition. Its practices have not been changed since that report was issued. The respondent takes care of the insurance in its own insurance department, and thereby absorbs about 7 cents per \$100 of value per annum.

The Jersey Central has never been a party to the arrangement of equalized insurance, the reason given being that on account of short hauls it receives only a small portion of the revenue, and cannot afford to assume any losses.

The record indicates that, generally speaking, the respondents prefer to consider what has previously been termed herein "insurance", as "extension of liability for loss or damage by fire." Whether or not there is a difference in the meaning of the two terms, it is clear that there is no difference in the advantages which may be extended to shippers by the "extension of liability for loss or damage by fire" or by "insurance," and the terms are used synonymously herein. The record is entirely conclusive that insurance is a definite part of the storage of goods.

under the arrangements effective under the so-called in-transit tariffs, and that the cost of furnishing it can be accurately determined.

[fol. 195] In view of our conclusions that the failure of respondents to charge compensatory rates for the storage and handling of goods results in violation of provisions of the act, it is clear that the furnishing of insurance by some of the respondent carriers at less than the cost thereof results in similar violation. The cases previously cited in connection with our discussion of storage are generally applicable to the insurance here considered and need not be repeated.

Summary of Principal Findings of Fact With Respect to So-called "Storage in Transit", and Services Incidental Thereto

1. Each of the seven class I respondent carriers considered herein provides by tariff publication for storage, handling, and with the exception of the Jersey Central for insurance of carload freight in warehouses, buildings, or piers owned or controlled by it or by companies with which it is affiliated.

2. The storage, handling, and insurance arrangements provided under respondents' tariffs, considered in the discussion herein in connection with the storage of eastbound and westbound carload freight and insurance, are not services incidental to transportation, but are commercial services. Similar commercial services are performed by competing warehouse companies in the Port of New York district, which are not owned or controlled by, or affiliated with, respondents.

3. The tariffs providing said services are a part of a scheme devised to purchase competitive traffic, and through said tariffs the respondents hold themselves out to perform or furnish commercial services under the guise of transportation services.

4. The said tariffs are instruments which work violations of the act, and the services provided by such tariffs are not properly subjects of tariff publication.

5. The respondents deal in and furnish commercial storage, handling, and insurance of goods at rates and charges

which do not reimburse them for the full cost of providing such services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods in their owned, controlled, or affiliated warehouse buildings or piers.

6. The respondents do not assume or bear any part of the cost of conducting the commercial operations of competing shippers who store goods in warehouses operated by said competing warehouse companies.

We find that, exclusive of storage and handling directly incident to immediate transportation or immediate delivery of goods, the storage, handling, and insurance of goods under tariff arrangements in warehouses or piers owned or controlled by, or affiliated with, respondent carriers, as [fol. 126] described of record and discussed herein, are commercial services provided to certain shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost thereof.

We further find that the provision by respondents of said commercial storage, handling, and insurance at such non-compensatory rates and charges reduces below the published tariff rates the transportation charges paid by certain shippers in interstate commerce, whose goods are so stored, handled and insured, and results in concessions to said shippers, to the extent of the difference between the cost to said respondents of providing such storage, handling, and insurance, and the amount which they receive therefor.

We further find that through such storage, handling, and insurance arrangements, and by granting such concessions, the respondent carriers are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said act, and depart from their published tariffs, in violation of section 6 of said act.

We are not to be understood as here condemning bona fide stoppage and storage in transit as permitted generally by carriers throughout the country, for the purpose of milling, manufacturing, or similarly trade processing the commodities stopped or stored.

We affirm our prior findings that the respondents' warehousing and storage practices, charges assessed therefor,

allowances made in connection therewith, and the insurance of goods as hereinbefore described in the Port of New York district, dissipate respondents' funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest.

An appropriate order will be entered.

MAHAFFIE, Chairman, dissenting in part:

With much of the discussion in the report I am in accord. Obviously the use of storage and warehousing as a means of securing traffic has led to grave abuses in the New York district. A deplorable feature is the fact that by the wasteful expenditures discussed little, if any, new traffic was developed. The result has been, in the main, to divert traffic from other carriers.

While agreeing that the situation developed by the investigation is bad and ought to be corrected, I am not satisfied that there is an adequate basis for some of the findings made and for parts of the orders entered. To justify a finding that the storage charge paid by a shipper results in a preference to him and a discrimination against other ship-[fol. 197] pers or operators of warehouses there is required, as I view it, a preliminary finding that the charge is less than just and reasonable for the particular service rendered. A finding that the warehouse is operated at a loss will not suffice. The warehouse may be badly located, expensive to operate, or may have cost too much initially. Present value may be only a fraction of original investment. The fact that operations as conducted do not pay operating cost, taxes, and return on investment, considered alone, is not controlling on the specific question whether an individual user is being unduly preferred. The extent of occupancy, among other factors, must also be considered. I think it obvious that charges based on 100-per cent occupancy do not necessarily become preferential when half the tenants move out and the use of the warehouse drops to 50 per cent. Taking a specific example, the majority find that the failure of the Pennsylvania Railroad Company to figure depreciation on its Harborside property results in a violation of the act. It is stated in the report that the Harborside Company, for the seven months' period considered, had a net income of \$18,800.71, and that, had it

accrued depreciation at 2 per cent on its building, carried at \$7,350,000, it would have had a net loss of \$66,949.29. The record shows that the occupancy during that period was less than 50 per cent. The point is that an increase in occupancy might well more than make up for the failure to accrue depreciation. Reasonable rates charged for storage cannot be raised as occupancy decreases as they would have to be to return at all times the full cost of the enterprise.

The principle that a carrier service may not lawfully be afforded at less than full cost, including depreciation, if applied generally would terminate a great many carrier operations. In my judgment, it is not a sound principle.

[fol. 198]

EXHIBIT "G" TO PETITION

(Referred to in Paragraph XII of Petition)

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of June, A. D. 1936.

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

It Appearing, That on December 12, 1933, the Commission made and filed its report in the above-entitled proceeding, and on May 6, 1935, the Commission, by appropriate notice assigned said proceeding for further hearing for the purpose of bringing the record down to date;

It Further Appearing, That such further hearing has been had, and that the Commission, on the date hereof, has made and filed a report on further hearing, containing its further findings of fact and conclusions thereon, which said report and the aforesaid report of December 12, 1933, are hereby referred to and made parts hereof, and the Commission hav-

ing found in said reports that certain practices of respondent carriers as fully described, in connection with the leasing of space, storage and handling of goods, and insurance, violate certain provisions of the Interstate Commerce Act as set forth in the said reports:

[fol. 199] It Is Ordered, That the respondent carriers, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company, and The Pennsylvania Railroad Company, be, and they are hereby, notified and required to cease and desist, on or before October 1, 1936, and thereafter to abstain, from permitting shippers in interstate commerce to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by, or affiliated with said respondents in the Port of New York district, at rates and charges which fail to compensate said respondents for the cost of providing said space.

It is Further Ordered, That the respondent carriers above named be, and they are hereby, notified and required to cease and desist, on or before October 1, 1936, and thereafter to abstain, from providing storage space in said warehouses, buildings or piers, to shippers in interstate commerce for commercial storage of goods, as fully defined and described in said reports at rates and charges which fail to compensate said respondents for the costs of providing said storage space.

It is Further Ordered, That the respondent carriers above named be, and they are hereby, notified and required to [fol. 200] cease and desist, on or before October 1, 1936, and thereafter to abstain, from the handling of goods at said warehouses, buildings or piers, incident to commercial storage as fully defined and described in said reports, for shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost of said handling.

It is Further Ordered, That the respondent carriers above named (except The Central Railroad Company of New Jersey) be, and they are hereby, notified and required to cease and desist, on or before October 1, 1936, and thereafter to abstain, from insuring goods stored in connection with commercial warehousing, at said warehouses, buildings or piers

in the Port of New York district for shippers in interstate commerce at less than the cost of providing such insurance.

It is Further Ordered, That the respondent carriers above named, be, and they are hereby, notified and required to cease and desist, on or before October 1, 1936, and thereafter to abstain from publishing or keeping on file with the Commission tariffs naming rates and charges for the leasing of space, storage, handling, and insurance of goods in connection with commercial warehousing services as fully defined and described in said reports, (which do not include such storage, handling, and insurance as is directly incident to transportation as defined in the act and described in said re-[fol. 201] ports) and said respondents are hereby notified and required to cancel effective on or before October 1, 1936, their tariffs now on file with the Commission naming storage, handling, and insurance rates and charges for said commercial warehousing services.

It is Further Ordered, That respondent Erie Railroad Company, be, and it is hereby, notified and required to cease and desist, on or before October 1, 1936, and thereafter to abstain, from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of excessive rentals paid for space leased from said Seaboard Terminal & Refrigeration Company, as described of record and in said reports.

And it is Further Ordered, That respondent, The Central Railroad Company of New Jersey, be, and it is hereby notified and required to cease and desist, on or before October 1, 1936, and thereafter to abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fols. 202-203] EXHIBIT "H" TO PETITION

(Referred to in Paragraph XIII of Petition)

Joint and several petition of plaintiffs, dated August 29, 1936, for rehearing, reargument and reconsideration of the

Commission's report and order of June 8, 1936. Copy attached hereto.

[fol. 204]

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[fol. 208] BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 104, Part 6

Practices of Carriers Affecting Operating Revenues or
ExpensesPart VI. Warehousing and Storage of Property by Carriers
at Port of New York, N. Y.

Come now the respondents in the above entitled proceeding and petition the Commission for rehearing, re-argument and re-consideration in respect thereof, and in support of their said petition respectfully show:

[fol. 209]

I

The Commission lacks power to prohibit respondents from publishing and filing with it tariffs naming rates and charges for storage, handling and insurance of goods delivered to and received by them for transportation.

The fifth ordering paragraph of the Commission's order of June 8, 1936, directs respondents

"to cease and desist, on or before October 1, 1936, and thereafter to abstain, from publishing or keeping on file with the Commission tariffs naming rates and charges for the * * * storage; handling, and insurance* of goods in connection

* Wherever the term "insurance" is used in connection with goods stored in transit it is to be understood as referring only to the provision of respondents' tariffs (other than

with commercial warehousing services as fully defined and described in said reports (which do not include such storage, handling, and insurance as is directly incident to transportation as defined in the act and described in said reports) and said respondents are hereby notified and required to cancel effective on or before October 1, 1936, their tariffs now on file with the Commission naming storage, handling and insurance rates and charges for said commercial warehousing services."

[fol. 210] The foregoing provision of the order is predicated on paragraphs 2 and 3 of the findings of fact set forth on page 355 of the report (Propriety of Operating Practices—New York Warehousing, 216 I. C. C. 291) in these proceedings. Paragraph 2 of the findings of fact states that "the storage, handling, and insurance arrangements provided under respondents tariffs . . . are not services incidental to transportation . . .", while paragraph 4 states that ". . . the services provided by such tariffs are not properly subjects of tariff publication."

In finding that the storage, handling, and insurance arrangements above mentioned are not services incidental to transportation and hence not properly subjects of tariff publication, we most respectfully submit that the Commission erred; and that it also erred in directing respondents to abstain from publishing and keeping on file with the Commission tariffs naming the rates and charges for the privileges and services referred to in said fifth ordering paragraph and in directing cancellation of the tariffs of like nature now on file. That this is so is, we submit, clear from what follows under this point.

those of the Central Railroad Company of New Jersey) whereby respondents, for a special consideration, agree to assume liability for actual loss or damage by fire only to the goods so stored. See, for example D. L. & W. I. C. C. 23575, Rule 5. The Central Railroad Company of New Jersey does not undertake, by tariff provision or otherwise, to assume such liability.

A. The Goods With Respect to Which the Storage, Handling and Insurance Privileges and Services Named in Respondents' Tariffs Apply are Goods Which Have Been Delivered to and Received by Respondents for Transportation

The only tariffs of respondents "naming rates and charges for . . . storage, handling and insurance of goods," which have been filed with the Commission and are [fol. 211] here under review are the tariffs applicable to storage in transit at New York Harbor points, including Newark, N. J. It is therefore clear that the fifth ordering paragraph of the Commission's order in the instant proceeding has reference only to such in-transit storage and to the handling and insurance of the goods so stored.

The "storage, handling, and insurance of goods" covered by said tariffs are facilities or services which respondents hold themselves out as willing to furnish or perform in connection with and only in connection with goods which have been received by them for transportation and against which respondents have issued bills of lading.

The goods in question, while in possession of respondents, are not held pending the election of the owner as to whether or not they will be tendered to respondents for transportation. On the contrary, the storage, handling, and insurance privileges covered by the tariffs are not available to the owner of the goods until the goods are in possession of respondents as common carriers. Moreover, the goods do not go into storage, nor are the handling services incidental thereto rendered, nor do the insurance privileges attach, until after a part (and in many instances only a minor part) of the strictly transportation service has been performed.

No warehouse receipt is issued upon delivery of the goods to respondents as was the practice in connection with the warehouse activities found to be ultra vires in *State v. So.* [fol. 212] *Pac. R. Co.*, 52 La. Ann. 1822, 28 So. Rep. 372; and upon which decision the Commission in the instant case (Report, p. 348) apparently relies as authority for holding that the in-transit storage privileges accorded by respondents are not incident to transportation. Aside from the significant fact that the Louisiana case did not involve the question whether or not the storage services which the railroad was performing at New Orleans were embraced within the meaning of the term "transportation" as defined in the Interstate

Commerce Act—the case having been decided in 1900, about six years before Congress enacted the present definition of the term—there is absolutely nothing in the cited decision from which it can be inferred that bills of lading were issued at the time the goods were delivered to the carrier or were outstanding while they were held in storage.

B. The Publication and Filing With the Commission of Tariffs Covering Not Only the Storage Services Performed by Respondents at New York Harbor Points in Connection With Goods Transported in Interstate Commerce But Also the Handling and the Insurance Arrangements Pertaining to Such Storage, are Specifically Required by the Act.

Section 1(3) of the Interstate Commerce Act provides that the term "transportation" shall include

"* * * all services in connection with the receipt, delivery, * * * storage, and handling of property transported"; (Italics ours).

[fol. 213] By Section 6(1) of the Act the respondents are required to publish in tariffs filed with the Commission

"* * * all storage charges * * * all privileges or facilities granted or allowed and any rules or regulations which in anywise * * * affect * * * the value of the service rendered to the * * * shipper or consignee"; (Italics ours).

while Section 6(7) prohibits the carrier from extending to any shipper or person any privileges or facilities in connection with the transportation of

"* * * property, except such as are specified in such tariffs."

We have already shown that the goods with respect to which the storage, handling and insurance privileges or services attach are only those which have been received by respondents for transportation and against which bills of lading have been issued, and we have also pointed out that such goods do not go into storage, that the handling services are not rendered, and that the insurance privilege is not available to the shipper or consignee until after a part of the strictly transportation service has been performed. In this

situation it is submitted as obvious that the above quoted all-embrasive provisions of the Act impose upon respondents the absolute and unqualified obligation to publish and file with the Commission tariffs wherein such privileges and services and the rates and charges therefor are clearly set forth.

[fol. 214] C. The Commission Has Erroneously Construed the Statutory Definition of the Term "Transportation".

As heretofore stated the Commission in its findings of fact says that the storage, handling, and insurance arrangements provided under respondents' tariffs are not services incidental to transportation and hence are not properly the subject of tariff publication. Such findings are in turn predicated on what is clearly an erroneous legal concept, namely, that the "storage" which Section 1(3) of the Act declares is embraced within the meaning of the term "transportation", is only such storage as the carriers are in duty bound to perform because of the failure of the shipper or consignee to remove the goods from the carrier's premises. In other words, according to the Commission's expressed view the storage contemplated by the Act is only the so-called "involuntary" storage, the obligation to perform which is imposed on the carrier by the omission of the shipper or consignee, as distinguished from storage services which the carrier volunteers to perform under storage-in-transit tariffs such as those here under review. Thus, at page 348 of the instant report, the Commission says:

"Involuntary storage is a part of the transportation service defined in section 1 of the Interstate Commerce Act. Other storage, *voluntary* or commercial in nature, is not included within the term 'transportation' as there used." (Italics ours.)

[fol. 215] The conclusion embodied in the foregoing excerpt is clearly erroneous and opposed to the decisions of the United States Supreme Court and of the Commission itself, to which reference will now be made.

The storage dealt with in *Cleveland & St. Louis R. C. v. Dettlebach*, 239 U. S. 588, and in *Southern Ry. Co. v. Prescott*, 240 U. S. 632, was not involuntary at all but the Court nevertheless held that it was embraced within the meaning

of the term "transportation" as defined in the Act. The storage considered in those cases was that which was performed by the carriers, as warehousemen, in connection with interstate shipments which the carriers, after arrival at destination and after the expiration of the free time (48 hours following notice of arrival) stored on their own premises. The free time having expired the carriers were no longer obligated by law to provide storage. They thereafter had the right to send the goods to a public warehouse and to thus relieve themselves of any further responsibility concerning them. And having that right and being no longer under any legal duty to provide storage themselves, it is perfectly clear that when the carriers undertook to store the goods on their own premises in accordance with the provisions of their published tariffs such action on their part was entirely voluntary. The propriety of tariff publication covering such voluntary storage was accepted by the Court without question.

[fol. 216] In *Commercial Club of Duluth v. N. P. R. Co.*, 13 L. C. C. 288, the carriers' tariffs provided for free storage in transit in carriers' warehouses at Duluth, Minn., and Superior, Wisc., on both east and west bound rail-lake traffic during the entire closed season of lake navigation. The Commission not only refused to find that the in-transit storage practice was unlawful and therefore not justified, as contended by complainant, but also pointed out that it had, by administrative ruling, specifically required that the tariffs providing for such storage privileges be filed with the Commission. The same practices and tariffs were again before the Commission in *Commercial Club of Duluth v. B. & O. R. Co.*, 27 L. C. C. 639, 658, and the Commission re-affirmed its findings in the earlier case.

In *Wharfage Charges at Atlantic and Gulf Ports*, 157 L. C. C. 663, 691, the Commission, having reference to charges imposed by the carriers for the storage of imported fertilizer and fertilizer materials for long periods of time at certain Gulf ports, stated that "Section 6 of the interstate commerce act provides that storage charges and all other charges which determine any part of the aggregate of the charges of interstate or foreign shipments shall be made the subject of tariff publication."

In *American Warehousemen's Asso. v. Inland Waterways Corp'n*, 188 L. C. C. 13, the issues concerned the lawfulness

of transit arrangements under which sugar originating on defendant barge line at New Orleans could be stopped and stored for periods as long as one year in the barge line's [fol. 217] warehouses at Memphis, Tenn., and other river ports and subsequently forwarded by rail beyond the river ports on the basis of joint through barge-rail rates applicable from origin to destination, plus the transit charge. With reference to the right of the carrier to engage in storage-in-transit and to the necessity, if it did so engage, of filing the tariffs covering the privilege with the Commission, it was said:

"It is well recognized that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render *storage service* in connection with shipments subject to our jurisdiction such service, *although not a service which it could be required to perform, is nevertheless included in the term 'transportation' as defined by the interstate commerce act.* Thus in *American Paper and Pulp Asso. v. B. & O. R. Co.*, 41 I. C. C. 506, 511, we said: 'In order to prevent overcharges and discriminations under the pretext of additional services, Congress enacted in section 1 that the entire body of such services, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term—transportation—and be subject to the provisions of the act respecting reasonable rates and the like. And by section 6 no carrier may extend any privileges or facilities, save as these have been duly specified.' * * * *As the storage here under consideration is a facility accorded by the barge line in connection with through barge-rail transportation subject to the act it is included within the term 'transportation' as defined by the act.*" (Italics ours.)

[fol. 218]. See, also, *Storage in Transit at New Haven, Conn.*, 190 I. C. C. 209, 211, where it is stated that

"Storage accorded goods at a point intermediate between the point of origin and final destination of the goods is not a necessary transportation service *but it is a transportation service for which a carrier may publish charges in its tariff* if the privilege is accorded to all shippers without discrimination." (Italics ours);

and Storage at New London and Thamesville, Conn., 190 I. C. C. 213, 214, where the Commission said:

"Protestants take the position that the proposed storage in transit is not a transportation service. *It is well settled that storage in transit comes within the meaning of the term 'transportation' as defined in section 1 of the interstate commerce act.*" (Italics ours.)

"In the light of the foregoing it is inconceivable that the term "storage" as used in section 1(3) of the Act can be held to have the limited meaning accorded to it by the Commission in the instant case. And it is, moreover, of interest to here note that in none of the above-cited decisions does it appear that the storage services which the Court and the Commission, respectively, held were included in the term "transportation" and hence performable only when put into tariff form and filed with the Commission, were storage services "*directly incident to immediate transportation or immediate delivery of goods*", which appears to be the criterion set up in the Commission's findings of fact (Report, [fol. 219] p. 355, last paragraph) for use in the determination of the question whether or not storage services which a carrier holds itself out as willing to perform is such storage as is embraced within the meaning of the term "transportation" as defined in the Act.

While the decisions above cited dealt specifically with storage services, the reasoning which underlies the conclusion that "storage" of the character of that here under review is incidental to and a part of the "transportation", applies with equal force to the handling services and the insurance privileges named in the tariffs and calls for the conclusion that they, too, are embraced within the meaning of that term, attaching, as they do, to the storage privilege.

It is unquestionable from the Report that the only alleged illegality found as to these in-transit services and privileges lies in the claim that respondents are rendering them at less than cost. If, on the other hand, there were here no question as to the compensativeness of the tariff rates and respondents undertook to render the same services at admittedly ample rates but without tariff publication, does anyone doubt that the Commission itself would be the first to demand that tariffs be filed to cover them? It would be

claimed—and rightly—that these arrangements “affect the value of the service” and an order requiring their publication in tariffs filed with the Commission would follow. From this it is evident that the finding that these in-transit services [fol. 220] and privileges are not properly the subject of tariff publication is unsound in law and is herein made only in an attempt to bolster up the more fundamental but equally unsound finding that the separately computed charges for such services and privileges are unlawful unless they cover the full costs (computed in the manner set forth in the report) of providing them.

To summarize, we submit that the definition of the term “transportation”, as used in the report directly conflicts with the definition heretofore accepted by the Supreme Court and by the Commission itself. According to the definition that has heretofore prevailed, the services and privileges involved must, under Section 6 of the Act, be provided for by tariff and the charges for them are therefore subject to regulation by the Commission under Sections 1, 2 and 3 of the Act. If the novel definition proposed in the instant decision prevails such services and privileges need not and indeed may not be provided for by tariffs filed with the Commission and are not subject to regulation under said sections of the Act. The radical change of administrative policy thus directly involved in the Order, so far as respondents’ counsel are aware, has never been argued before or even considered by the entire Commission.

[fol. 221]

II

The Commission’s order is legally unsound in that it requires respondents to refrain from storing goods in transit and from performing related services at less than the “full cost” of such storage and related services, separately considered.

* Our understanding of the terms “cost” and “full cost” as used in the Report is that they include not only the amounts expended for maintenance and operation, insurance, taxes and other out-of-pocket costs, but also allowances for depreciation and interest on investment. (Report, p. 337, par. 3; p. 346, last paragraph).

Our contention under this point is addressed to the second, third, and fourth ordering paragraphs of the order of June 8, 1936, in so far as they apply to the storage of goods in transit at New York Harbor points, to the handling services and to the insurance privilege incident to such storage, all of which are now covered by tariffs on file with the Commission.

It is far from clear that the second ordering paragraph of the order has reference to the in-transit storage services which respondents hold themselves out as willing to perform under their tariffs. The paragraph requires the respondents to desist from "providing storage space . . . to shippers . . . at rates and charges which fail to compensate . . . for the cost of providing said storage space." It is to be observed, however, that the order does not specifically direct respondents to refrain from storing goods for shippers but only to refrain from providing them with storage space for commercial storage, considering which it may well be asked whether the order as thus framed has any application whatever to situations where, as under respondents' storage-in-transit tariffs, the goods are placed in the custody of the carrier and the latter performs the storage services, and whether said order is not limited to instances where all that the carrier does is to assign or let to a shipper certain space wherein the shipper himself may store his goods if he sees fit to do so. In the instance first referred to respondents would be responsible as warehousemen for the safety of the goods; in the latter instance such responsibility would not attach.

We will, however, for the purposes of this discussion, assume that the second ordering paragraph was intended, among other things, to prohibit respondents from storing goods for shippers, as they now do under their storage-in-transit tariffs, unless after October 1, 1936, the rates and charges exacted for such storage, standing by themselves and independently of the freight rates, are sufficiently high to yield to respondents the full cost of performing the storage services. As respects the prohibitions directed against the "handling of goods" and against the practice of "insuring goods", set forth in the third and fourth ordering paragraphs, respectively, there can be no question about their applicability to goods stored in transit under respondents' tariffs; especially since such ordering paragraphs specifically apply to "commercial

storage" and to "commercial warehousing", and since the storage, handling and insurance services and privileges covered by respondents' tariffs are arbitrarily (as we submit) classified by the Commission (Report, p. 355, par. 2) as "commercial services" and not services incidental to transportation.

The concept underlying the order appears to be (a) that the rates which respondents charge for such services and privileges do not in and of themselves and independently of the freight rates, reimburse respondents for the "full costs" of providing the storage and handling services and of assuming liability for loss and damage by fire to the goods stored (Report, p. 355, par. 5) and (b) that to the extent that respondents fail to exact, in the aggregate, cumulative charges over and above the freight rates which yield such costs, the strictly transportation charges paid by shippers are reduced below the published tariff rates (Report, pp. 355-356, par. 6). That such a doctrine is manifestly unsound and so completely divorced from practical affairs as to be unworkable will clearly appear upon even superficial reflection. It makes no allowance whatever for the controlling effect upon storage charges of the law of supply and demand and would require (1) different storage charges at the several warehouses, (2) widely fluctuating charges in each warehouse, and (3) widely differing charges [fol. 224] by competing carriers as the relative volume of traffic fluctuated from month to month.

We have heretofore shown that the storage services and the handling and insurance features incident thereto which are covered by respondents' tariffs, are embraced within the meaning of the term "transportation" as defined by the Act. They are therefore a part of the transportation services which respondents hold themselves out as willing to perform for all shippers alike (compare, *Amer. Warehousemen's Asso. v. Inland Waterways Corp.*, 188 I. C. C. 13, 17).

In this situation it seems clear that there is no legal justification for the insistment of the Commission that

"* * * If respondents are to continue engaging in such business' (sic, the storage, handling, and insurance of goods in transit) "their charges directly or indirectly for storage or warehousing, and for the privileges or services rendered in connection therewith, must be put on a basis which, entirely independent of freight rates,

will reimburse respondents for the full costs of such services." (Prior Report, 198 I. C. C. 134, 201; Report of June 8, 1936, p. 346).

The conception that each factor of the transportation service which a railroad may render must separately pay its way (i. e., reimburse the railroad for the full cost of performing it) in order to escape the taint of illegality is as unsound in law as it is in logic. To say that a return [fol. 225] which comprehends both depreciation and interest on investment is essential to legalize railroad activities is to condemn the whole gamut of their common carrier operations because there is no fact of greater common knowledge than that for several years the railroads have failed to earn such a return. If the providing of storage services which can be or are availed of by only a limited number of shippers is unlawful on the theory that the return does not cover, in these days of industrial depression, full depreciation and interest, it follows by the same token that a carrier is also guilty of unlawfulness in providing, at less than similarly computed costs, meals in its dining cars which are availed of only by a limited number of those who travel, or in providing for the transportation of baggage without charge over and above the railroad fare for such limited number of passengers as take advantage of the privilege. The unsoundness of any order or rule making failure to secure such a return proof of positive unlawfulness is too obvious to require further argument.

So far as we are aware the instant case is the first case wherein it has been held that a carrier violates the provisions of the Act by failing to exact for each of the several incidental transportation services embraced within the meaning of the term "transportation" charges which, in and of themselves and independently of the freight rate, will fully compensate the carrier for the cost of providing such incidental services. On the other hand it would appear from the clear weight of authority that the charges [fol. 226] imposed for the incidental services are not open to attack unless they are so low as to reduce the charge for the entire transportation service to such level as casts a burden on other traffic.

No special charges whatever in addition to the freight rates were exacted for the storage services which were

performed by the carriers and with which the Commission dealt in *Commercial Club of Duluth v. N. P. R. Co.*, *supra*. The goods were there stored free of charge in carrier warehouses during the entire period (from four to five months) when the lakes were closed to navigation. Yet the Commission found nothing wrong with the practice, this, no doubt, because it nowhere in the report appears that the revenues of the carriers as a whole were non-compensatory, that is to say, it does not appear that the cost of providing the storage services operated to reduce the total freight charges to a non-compensatory basis. Thus, at page 290 of the report (13 I. C. C. 288) in that case it was said: " . . . no basis exists for holding that the rate to St. Paul is not compensatory to the railroads even on shipments receiving free storage."

It is clear from the report in *American Pulp & Paper Assn. v. B. & O. R. Co.*, 41 I. C. C. 506, 511, that the practice of providing free storage on imported woodpulp for long periods of time was condemned because the handling costs, the storage costs and the haulage costs in combination ate up and more than ate up all of the revenue derived from a [fol. 227] great part of the traffic. Thus, it was there said:

" . . . the evidence is sufficient to raise a very strong presumption that the handling, storage, and hauling of much of the wood pulp transported by defendants during the year 1915 resulted in net losses to them."

Furthermore, when it is borne in mind that the freight rates there under consideration covered not only the haulage service but the storage and handling services as well, the Commission's statement (*Id.*, p. 511) that "rates which are not in some degree compensatory necessarily discriminate in favor of the traffic transported under such rates and unduly prejudice other rates", may well be taken as a plain intimation that if the amounts charged for storage, handling and haulage services combined were compensatory, unlawful discrimination and prejudice would not necessarily result.

In *American Warehousemen's Assn. v. Inland Waterways Corp.*, *supra*, it was contended by complainant that the charge made for storage in transit and the incidental handling into and out of defendant's warehouse was so low as virtually to amount to free storage, resulting in a concession

from the published tariff rate and in discrimination against other traffic. The Commission disposed of such contention (Id., p. 18) by saying that it did not there appear "*that the total transportation charges for the through barge-rail movement, including the transit charge, is noncompensatory or so low as to unduly prejudice or impose a burden on other [fol. 228] traffic.*" And in the latter connection it suffices to say that it does not appear in the instant record that on traffic accorded storage in transit the total transportation charges, including those collected for haulage, for storage and incidental handling, and for insurance, are non-compensatory or so low as to cast a burden on other traffic.

Decisions of the courts which lend support to the principle that charges which cover only a part of the entire transportation services should not be condemned as unlawful because, standing alone and independently of the freight rates, such charges fail to equal the full cost of the incidental services to which they apply, are the following:

St. Louis etc. R. Co. v. Gill, 156 U. S. 649, where it was held (pp. 665-666) that a carrier cannot claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative.

Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1, 26-27, where it was said that the mere incurrence of a loss from the performance of a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness in rates if the "whole scheme of rates was reasonable".

Northern Pacific R. R. v. North Dakota, 236 U. S. 585, 600, where it was pointed out that the effect of a rate must be considered with respect to the whole business governed by the rate.

[fol. 229] Atchison etc. R. Co. v. United States, 203 Fed. 56, 59, where the court announced that a carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expenses.

Of similar import are the following decisions of the Commission:

Louisville & Nashville R. R. Coal and Coke Rates, 26 I. C. C. 20, 29-30;

Stonega Coke & Coal Co. v. L. & N. R. Co., 39 I. C. C. 523, 541-542;

Pacific Lumber Co. v. N. W. P. R. Co., 51 I. C. C. 738, 757;

Constructive Mileage over Poughkeepsie Bridge, 66 I. C. C. 230, 233;

Nebraska Livestock case, 89 I. C. C. 444, 456; and

Rates on Cotton to Gulf Ports, 123 I. C. C. 685, 702, where the Commission stated that the rates and charges of a railroad can not be based entirely on the cost for each particular character of service rendered, and that if such were the case the passenger with baggage would pay more than the passenger without baggage.

In concluding our discussion under this point we invite the Commission's attention to the fact that here, also, is presented a fundamental question of law and of administrative policy as to which the instant report announces a novel doctrine in direct conflict with the decisions of the courts and of the prior decisions of the Commission itself.

[fol. 230]

III.

The Commission erred in prohibiting respondents from permitting shippers to occupy space "by lease or otherwise", from providing storage space and from performing general storage and the incidental handling, except under rates and charges which will compensate respondents for the cost of providing said space and the cost of such service.

In the first three ordering paragraphs of the order entered in this proceeding, the Commission requires that on or before October 1, 1936, the respondent carriers desist and thereafter abstain:

1. From permitting shippers in interstate commerce to occupy space by lease or otherwise in warehouses, buildings or on piers of respondents in the Port of New York district;
2. From providing storage space in said warehouses, buildings or piers to shippers in interstate commerce for commercial storage of goods;
3. From the handling of goods at said warehouses, buildings or piers incident to commercial storage for shippers in interstate commerce;

at rates and charges which fail to compensate said respondents for the cost of providing said space and for the cost of said handling.

The parts of the Commission's order to which we refer are based upon findings in substance that respondents pro-[fol. 231] vide shippers with space in their warehouses and buildings or on their piers at rates and charges which fail to compensate respondents for the cost of providing such space and are performing "commercial storage" and the incidental handling at less than the cost of providing the service; that by the amount of the difference between such cost and the rates and charges exacted by respondents the latter are granting concessions from the tariff rates in violation of Sections 2 and 6 of the Act, are granting preferences to such tenant shippers and are discriminating against other shippers in violation of Section 3 of the Act.

To clear the discussion of any uncertainty which might otherwise arise from the terminology of the order, we, at the outset, state the meaning which, for the purposes of the argument, we ascribe to the commands of the Commission. We take the prohibition of the first ordering paragraph to refer to all leases or rentals or other assignment of space to shippers for their use, regardless of the purpose thereof. The second ordering paragraph, as we have heretofore pointed out, does not in terms prohibit any kind of storage but only refers to "providing storage space", that is to say, the assignment of space for use of shippers. In that sense the second command of the Commission would seem to be covered by the first ordering paragraph; but for the purposes of the discussion we will assume that it was the intention of the Commission also to include in the prohibition of such second ordering paragraph "general stor-[fol. 232] age" by the respondents, i. e., storage not performed or to be performed under filed and published tariffs, as well as "in-transit" storage, which is accorded under tariff publications and only after part of the transportation has been performed. Likewise, we assume that the Commission, by the use of the term "commercial storage", in the third ordering paragraph, intends thereby to include in the prohibition of said paragraph handling charges incident to both "general" and "in-transit" storage. "In-transit" storage and its incidental services have been dealt with under preceding headings and will not be here considered.

We understand that when the Commission speaks in its order of rates and charges which shall compensate for the cost of providing space, that it means such a rate or charge as will at all times afford a reasonable return to the car-

rier on its investment in the land, buildings or space which shippers in interstate commerce are permitted to occupy or which are provided for storage or other purposes, to such shippers. Stated in another way, the respondent must exact such a rental or charge as will cover interest on money invested, depreciation, taxes, insurance, maintenance and cost of operation (see footnote, ante, p. 14).

As to Occupancies by Shippers of Space "by Lease or Otherwise"

In the cases which the Commission cites on the question of the measure of rental or charge which must be exacted by the carrier from the shipper who is permitted to occupy [fol. 233] space "by lease or otherwise" in order to avoid violation of the Act, we find no support for the Commission's order limiting respondents to such rentals only as it may be able to negotiate at rates which fully compensate for the cost of providing the space occupied or demised. Moreover, the Supreme Court has judicially noticed that since 1929 there has been a great collapse of values of railroad and other properties (*Great Nor. Ry. v. Weeks*, 297 U. S. 135, 149) from which it follows that the rental values of such properties and the value of storage space therein have suffered a like depreciation. Therefore, to insist that charges made for the use of respondents' properties must be high enough to compensate for the "cost" (computed in accordance with the Commission's formula) of providing the space or the storage services, is to require the impossible.

On the other hand the legal right of the carrier to lease surplus space or facilities to shippers at reasonable rental, even though such lessees are thereby advantaged over other shippers unable to obtain leases, is well settled.

Andrews Bros. Co. v. P. R. R. Co., 123 I. C. C., 733;
Williams-Thompson Co. v. A. & W. P. R. R. Co.,
126 I. C. C., 417.

See also

Donovan v. P. R. R., 199 U. S. 279.

[fol. 234] This right is clearly recognized by the court in *C. C. C. & St. L. R. Co. v. Hirsch*, 204 Fed., 853, repeatedly cited by the Commission in this connection. In the course of discussing a lease to a shipper which the court found to result in a concession, it was said:

"This in no wise militates against the right of a carrier to let or permit the use of its property at a reasonable rental." (Bottom of page 853.)

That it is entirely inconsistent with the idea of reasonable rental that a landlord must at all times, regardless of circumstances and conditions involved, obtain from his tenant the cost of providing the occupancy, is indicated by Judge McLaughlin of the New York Court of Appeals, in *Glenbrook Co. v. Phillips*, 243 N. Y., 186, at pp. 190-191. It is there said:

"No general rule can be laid down which will establish in every case what is a fair return or rental on real estate. Each case must necessarily depend upon the peculiar circumstances involved. Assessments, cost of maintenance and repairs, the rate of interest and many other elements may enter into the determination of that question. As well might it be said that a fixed price could be established for a suit of clothes, a pound of sugar or a barrel of flour, as that a fixed sum can be established as a fair rental for the use of real estate. Usually, such prices are regulated by the supply and demand. What is a fair price in each case must necessarily depend upon evidence, which is but another way of saying that usually a question of fact is presented. It would indeed be an unusual case where the court could hold as a matter of law what is a fair return."

[fol. 235] Commissioner Mahaffie recognizes the logic of this construction of the term "reasonable rental" when he points out in his dissenting opinion in this proceeding that in order to justify a finding that the storage charge paid by a shipper results in a preference to him and a discrimination against other shippers, a preliminary finding that the charge is less than just and reasonable for the particular service is required.

The Commission itself has sanctioned a measure of rental in accord with the foregoing expressions of the Courts but inconsistent with its order in this proceeding. In *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C., 663, at p. 691, it is said:

"Leasing a warehouse for storage that is not incident to interstate or foreign commerce should be governed by the principles announced in *Leases and Grants by Carriers to Shippers*, 73 I. C. C., 671."

and the Commission quoted with approval what was said in the opinion in the latter case as follows:

"Every effort should be made by the carriers to obtain, when leasing land to shippers, terms no less favorable than would be obtained, under similar conditions and restrictions of use, were the land owned independently of the railroad."

In the instant report in this proceeding (p. 340, last par.) the Commission tells us that the renting of space to shippers for storage which is not a part of transportation as defined in the Act "must be governed by the principles announced in Leases and Grants by Carriers to Shippers, supra; * * *"

[fol. 236]. We say the measure thus previously announced is inconsistent with the prescription of the Commission herein because the former permits of the consideration of supply and demand, of depreciation in value, which the Commission's order bars, and of consideration of all the peculiar circumstances and conditions involved which have a place in all ordinary rental transactions but many of which are barred by the Commission's order (see dissenting opinion by Commissioner Mahaffie).

This becomes clear if we examine the above-quoted criterion prescribed in Leases and Grants by Carriers to Shippers, supra, which the Commission has apparently considered sound heretofore. What would the independent landlord obtain in the way of rental for his property? This it seems to us would depend largely upon demand or lack of demand for the particular kind of property which such a landlord had to offer. During prosperous times of great business activity with brisk demand for his property he might and probably would obtain rental, as would other owners of similar property, sufficient to cover interest on the cost of his land and buildings, depreciation, insurance, taxes, maintenance and cost of operation. In times of business stagnation and consequent decreased demand for his kind of property, he would obtain no more therefor than other owners were asking and obtaining for comparable property in the locality. Such an independent landlord, because of the surplus of available property over the demand therefor, might not be able to rent it at all during [fol. 237] such a period of depression or to obtain any in-

come whatever therefrom. He might in competition with other owners of similar property be fortunate enough to rent his property at a figure sufficient to meet all or part only of the out-of-pocket cost of holding, maintaining and operating the property and in that way partially to avoid loss; but it is clear that under the circumstances stated such a landlord could not and would not obtain as rental the "cost of providing" the occupancy and it is altogether likely that during a prolonged period of business depression like that now afflicting the country, he would accept prevailing rentals, although something less than such "cost", rather than the alternative of a total loss of revenue from his property while awaiting the return of normal business conditions.

After all, then, the measure of the rental which the Commission prescribed in Leases and Grants by Carriers to Shippers, *supra*, is but another way of saying that the carrier must obtain from its shipper-tenants the "reasonable market rental" value (as the idea is phrased in the Commission's report, page 353) or as the same idea is sometimes expressed, the "going rental".

Measured in the way the Commission has thus heretofore prescribed there is no basis for the omnibus finding in the instant case that respondents' rentals, and charges violate sections 2, 3 and 6 of the Act, nor for the order based thereon.

It would seem unnecessary to argue that if respondents exact the reasonable rental—i.e., the reasonable market [fol. 238] rental—or the best rent obtainable under existing competitive conditions and in view of existing supply of and demand for similar space in the vicinity, the transaction can not be made the basis of a charge of rebating or of illegal discrimination.

There may be isolated cases of rentals, of occupancies, or of storage, where the rental received or the charges made do not meet this test of a reasonable rental or charge. If so, the remedy is to require conformity—not to destroy the legal-right of the carrier to derive revenue from its surplus space by the imposition of an impossible requirement.

As to General Storage and Incidental Handling

What we have said as to rentals and charges for occupancies of shippers applies with equal force to charges for

general storage and incidental handling. As Commissioner Mahaffie points out in his dissenting opinion, there is lacking the preliminary finding that rates and charges paid for these services are less than just and reasonable; nor is there in the record any basis for such a preliminary finding. As we said of rentals we say here of charges for storage and incidental handling: If respondents have charged for these services the best rates obtainable under existing conditions of competition and of supply and demand—and the record shows that they have—there can be no basis for the Commission's finding against respondents that their said charges work concessions from the transportation rate, unlawful preferences and discriminations.

[fol. 239]

IV

The finding of illegality in respondents' charges for rentals and for general storage is predicated upon the erroneous doctrine that such charges must reimburse respondents for the full cost of providing the space or performing the services and the order based thereon is arbitrary and deprives respondents of their property in violation of the Fifth Amendment.

With respect to the general warehousing activities of respondents (i. e., their activities other than those covered by the storage-in-transit tariffs) the Commission finds that in some instances free occupancy of space is permitted for a period before any rental is charged; in others that price reductions are made on storage, handling and rentals; and in still others that certain alterations in the rented space to adapt it to the particular needs of the tenant are made at respondents' expense (Report, p. 296). However, the basis for the Commission's general charge of non-compensatory return and hence of the unlawfulness found is simply that the return fails to equal the "cost of providing" the space or of performing the services, as the case may be, when such costs are so computed as to reflect not only the out-of-pocket costs but also depreciation and interest on investment at certain rates arbitrarily prescribed [fol. 240] by the Commission. That this is so is manifest from the reference on page 295 of the instant report to Appendices I and II of the prior report and from the Commission's remarks (Report, pp. 305, 314, 315, 317, 336)

concerning the alleged losses from the operation of various warehouse enterprises.

There is no finding that the particular concessions above referred to are not such as are of frequent occurrence in the activities of the so-called independent warehousemen with which respondents compete, nor any finding that in the hands of owners or operators divorced from all relation to a railroad—that is to say, in the hands of independent landlords—all or any particular one of the properties in question could or would have made a better showing in 1935 or any other year than the reports in this case indicate they actually made. Indeed, the record contains no evidence which would support such findings.

In our discussion under caption “III” we have pointed out the fallacy of the doctrine that respondents must, in order to avoid violations of the Act, put their charges for general storage, for space leased to shippers and for services in connection therewith on a basis which will reimburse respondents for the full cost (computed in accordance with the Commission’s formula) of providing the space or of performing the services. And we have also under that caption shown how opposed such doctrine is to the true rule announced in *Leases and Grants to Shippers*, 73 L. C. C. 671, 686, to the effect that the carriers, when [fol. 241] leasing land to shippers, should make “*every effort . . . to obtain . . . terms no less favorable than would be obtained . . . were the land owned independently of the railroad.*”

Plainly, the standard which the case last cited prescribes as the test of the adequacy of the return is elastic and in marked contrast to the rigid criterion set up in the Commission’s order in these proceedings. It is tempered with the rule of reason and practicability and under it the question as to whether or not the return is adequate depends upon the bona fides of the carrier’s efforts to obtain terms as favorable to it as an independent landlord would obtain were he the owner of the property and upon the attendant circumstances and conditions and upon what reasonably prudent and capable independent owners of similar properties would obtain under like circumstances and conditions.

The record in the instant case, we respectfully submit, contains no evidence upon which to support a finding that

respondents have been derelict in their efforts to obtain for the use of their properties returns higher than those actually obtained. It contains no evidence upon which to support a finding that under the attendant circumstances and conditions, private owners, had they owned respondents' properties, would or could have obtained for their use returns in excess of those actually obtained by respondents. Nor does it contain any evidence from which it can be found that independent, non-railroad landlords, during the same [fol. 242] period, obtained for the use of like properties owned by them returns greater than those actually obtained for the use of respondents' properties. Such findings are indispensable and jurisdictional under the Commission's own ruling (*Leases and Grants to Shippers*, supra) before a valid order will lie commanding respondents to make any increases in their charges for the use of space in warehouses and other buildings and for general storage services performed by them. Yet notwithstanding the absence of such findings the Commission, in the instant case, has, in substance and effect, not only directed respondents to increase their aforesaid charges but to increase them to a level which, because of the impossibility of doing any business under them, means the closing of respondents' buildings in which their warehousing and general storage operations are conducted and the discontinuance of such operations by them. Instead of decreasing respondents' alleged losses, the effect of the order will necessarily be to increase them and to deprive respondents of their entire income from the properties in question.

The utter impracticability of obtaining higher charges for the use of respondents' facilities under existing conditions is evident from the finding on page 295 of the instant report that "there is not enough business to fill all of the warehouses in the Port of New York District" and from the further finding on the same page that even before much of the railroads' own storage space was put on the market there was a surplus of privately owned space. Under such circumstances [fol. 243] stances the idea that rates for general storage or for the use of space in warehouses can be increased to the level required by the Commission's order is entirely fanciful.

The competitive results of an oversupply of storage space obtain among private owners as much as among railroad

owners. There is no evidence of greater ability on the part of private owners to maintain a "fixed standard of rates for storage or the rental of space" (Report, p. 296) than on the part of railroad owners. And the fact that, entirely aside from respondents' properties there is (Report, p. 295) an oversupply of privately-owned storage facilities, is conclusive that conditions complained of by complaining warehousemen (Report, p. 296) are inherent in their own industry and obviously would continue even if respondents' facilities were withdrawn from the market.

That the charges of respondents are not in reality unlawfully low is virtually conceded by the admission of complaining warehousemen to the effect that their attack was not directed so much against the measure of such charges as to an effort to get the carriers entirely out of the warehousing business. Thus, at page 297 of the instant report the Commission, quoting from pp. 139-140 of its prior report said:

"Although the complaint originally *seemed* directed to the measure of the charges made by the carriers for their warehouse services, and a great deal of evidence was offered by private warehousing interests going to the matter, it *was emphasized* at the hearing that the *real intent and purpose* of the complaining warehousemen is to get the carriers entirely out of the warehousing business." (Italics ours).

[fol. 244] Complaining warehousemen are fully cognizant of the futility of claiming that railroad warehouse rates are out of line with their own rates in a field which they themselves over-crowd. In fact, they submitted practically no evidence showing what the charges were which they imposed for the storage of specific commodities or for rental of space in their warehouses. There exists, therefore, no basis upon which comparison of railroad charges and complaining warehousemen's charges can be made, much less a finding that the former are lower than the latter. Unable to prove their complaint against the "measure of the charges" assessed by respondents, complainants, as found by the Commission, addressed themselves to their "real intent and purpose" of ousting respondents completely from the warehouse and storage field. The Commission concedes that it has no power to do this directly (Report, p. 350; prior report, p. 195), yet in effect the order in the instant case does no less since compliance with it means the closing of re-

spondents' facilities because of the impracticability of operating them at rates and charges which, under the Commission's decree, must be materially higher than those imposed by complaining warehousemen. And that too, notwithstanding the proof does not justify condemnation of respondents' present rates as unlawfully low in view of the Commission's own previously announced criterion (Leases and Grants to Shippers, *supra*) and the virtual abandonment of such contention by complainants.

In the light of the foregoing it is submitted that the order in the instant case is not justified by the evidence and so [fol. 245] opposed to the rule of reason and the Commission's own pronouncement as to the measure of the charges which respondents should exact for general storage and for the rental of space as to be arbitrary and in contravention of the Fifth Amendment to the Constitution of the United States.

V

The findings upon which the alleged violations of Sections 2, 3 and 6 rest are insufficient in law to support such violations.

Under the preceding caption we have pointed out that it does not appear of record that respondents' rates and charges for general storage and for space rentals are lower than, or that their practices incident to the making of leases are different from, those of competing private warehousemen in the New York district. It therefore must be assumed that respondents' rates and charges are on the going basis and that their practices in connection with leases are those which also obtain among such private warehousemen. And that being so it must of necessity follow that any shipper who pays respondents their rates for general storage or for the use of space and thereafter pays their published tariff charges for transportation is in the same position as he would be in if he paid the same going rates to a private warehouseman [fol. 246] for storage or the use of space and then paid respondents' tariff charges for transportation of the same freight to the same destination. In either instance he pays the market value for the non-transportation service or facility which he buys or uses and the published tariff charge for the transportation service. He gets nothing from the carrier in the way of non-transportation services or the

use of facilities which he could not get from others for the same consideration or charge. There is nowhere in the report any finding that shippers in the two examples referred to do, in fact, receive their warehousing and transportation services at any different aggregate costs, and without such proof there is, it is respectfully submitted, no basis in fact or in law for a finding of violation of Sections 2, 3, or 6 of the Act.

It is well settled that a mere difference in transportation rates, or in treatment of shippers by carriers, is not sufficient to establish an infraction of either of those sections. The difference condemned by the statute is one that is undue in fact and until such character of the difference is established there exists no ground for a finding that any of said sections is violated.

It is not disputed that railroads may lawfully lease surplus properties despite the fact that the lessee thereby obtains certain advantages which are not or cannot be availed of by others who are either unwilling to lease or because of the limited supply are unable to obtain leases covering similar properties (*Andrews Bros. Co. v. P. R. R.*, 123 I. C. C. [fol. 247] 733; *Williams-Thompson Co. v. A. & W. P. R. Co.*, 126 I. C. C. 417). Such discrimination, however, is not undue and therefore not unlawful, and the advantages, whatever they may be, which accrue to those who store their goods in railroad warehouses or who lease space therein are no greater than those enjoyed by the tenants whose leases and privileges were dealt with in the cases last cited.

Wherefore, having heretofore filed a petition dated August 26, 1936, for a postponement of the effective date of said order, respondents pray that the proceedings herein be reopened for further hearing and for reargument and reconsideration. Respondents had no reason to believe that the procedure subsequent to the second hearing in this case would not be the same as the procedure which followed the original hearing, that is to say, that a proposed report would be issued and opportunity afforded respondents to file such exceptions thereto and present such argument in support thereof as they deemed advisable. In fact they were led to believe that the latter course would be followed (*Minutes of session held July 6, 1935, p. 3972*). The issuance of the Commission's report and order of June 8, 1936, therefore came as a surprise to respondents, not merely because of the fact

that they were not afforded the customary opportunity of taking exceptions to the Examiner's recommendations as to findings of fact and conclusions of law, but also because of [fol. 248] the novel propositions of law on which the report rests. These circumstances, they submit, fully justify the filing of this petition and their request for further hearing, reargument and reconsideration.

If further hearing is had respondents are prepared to establish by competent evidence, among other facts, the following:

1. That their rates and charges for general storage and incidental services and for the rental of space in warehouses and other buildings owned or controlled by them are the going market or competitive rates charged for the same or similar storage services and rentals by the so-called independent or non-railroad warehousemen in the New York district;
2. That their aforesaid rates and charges are as high as are obtainable under present conditions;
3. That their practices in connection with the negotiation of leases and the fixation of rentals reserved therein are the same, in substance and effect, as the common or standard practices obtaining among independent or non-railroad owners of similar properties in the New York district; and
4. That the returns to respondents in connection with the renting of properties and the storage of goods not in transit are as high as they could reasonably be expected to be were [fol. 249] such properties "owned independently" of respondents and the storage services performed by independent or non-railroad warehousemen.

Respectfully submitted, E. H. Burgess, A. H. Elder,
T. P. Healy, W. J. Larrabee, M. B. Pierce, Guernsey Orcutt, C. R. Webber, Counsel for Respondents.

New York, N. Y., August 29, 1936.

[fol. 250]

EXHIBIT "I" TO PETITION

(Referred to in Paragraph XIII of Petition)

Motion of The Central Railroad Company of New Jersey, dated November 21, 1936, to rescind certain findings and

vacate an order respecting its lease to The Newark Central Warehouse Company. Copy attached hereto.

[fol. 251] BEFORE THE INTERSTATE COMMERCE COMMISSION

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Ex Parte No. 104, Part VI

Motion of the Central Railroad Company of New Jersey to Rescind Certain Findings and Vacate an Order Respecting its Lease to the Newark Central Warehouse Company

Comes now The Central Railroad Company of New Jersey, Respondent herein, and moves that the Commission rescind the findings of fact on Sheets 26 and 30 of its Report and vacate the last paragraph of its Order, both dated June 8, 1936, in reference to its lease of a warehouse in Newark, New Jersey, to the Newark Central Warehouse Company, in that said findings and order are unsupported by evidence; are contrary to the "indisputable character of the evidence"; and are based upon clear errors of law.

[fol. 252] The Findings and Order

The findings which this Motion requests the Commission to rescind are shown on Sheets 26 to 30 of the Report, the principal findings being as follows:

"1. The Newark Warehouse Company is a wholly-owned and controlled subsidiary of the Jersey Central. The railroad dominates and controls the warehouse company and uses it as an adjunct of its traffic department.* The warehouse company is in effect a part of the railroad.

"2. The Jersey Central, through its said wholly-owned subsidiary, permits the occupancy, by the Newark Central Warehouse Company, of the warehouse of its wholly-owned subsidiary at Newark, N. J., described of record, under leasing arrangements which fail to compensate said railroad for its cost in providing space in said warehouse.

* Italics ours.

"3. The Newark Central Warehouse Company is a shipper in interstate commerce, and stores goods for shippers in interstate commerce in competition with certain other warehouse companies who are also shippers in interstate commerce and who store goods for other shippers in interstate commerce over the Jersey Central in the Port of New York district. The Jersey Central, through leasing arrangements with the Newark Central Warehouse Company, as described of record, bears directly a portion of the expense of commercial operations of the latter company, and indirectly a portion of the expense of commercial operations of the shippers who store goods with the latter company. [fol. 253] The Jersey Central does not bear any portion of the expense of commercial operations of the competing warehouse companies or of shippers who store goods with such warehouse companies.

"We find that by means of the leasing arrangements described of record, the Jersey Central reduces below the published tariff rates, the transportation charges on interstate shipments handled or stored by the Newark Central Warehouse Company, and thereby the Jersey Central grants concessions on such interstate shipments to the extent of the difference between the cost to said railroad of providing said space and the amount which it receives for the occupancy thereof.

"We further find that through such leasing arrangements, and by granting such concessions, the Jersey Central is guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the Newark Central Warehouse Company and to shippers who store goods therewith, and subjects competing warehouse companies and shippers who store with such warehouse companies to undue and unreasonable prejudice and disadvantage, in violation of section 3 of said act, and departs from its published tariff rates, in violation of section 6 of said act."

The part of the Order which this Motion asks the Commission to vacate consists of the last paragraph of the Order and reads as follows:

"And it is further ordered, That respondent, The Central Railroad Company of New Jersey, be, and it is hereby, [fol. 254] notified and required to cease and desist, on or

before October 1, 1936,* and thereafter to abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports."

(1) There Is no Evidence to Support the Commission's Findings

It is true that the warehouse in question is wholly owned by The Central Railroad Company of New Jersey through a subsidiary, but it is not true that the railroad "uses it as an adjunct of its traffic department." Furthermore it is not at all true in substance and, except as to a negligible fraction of its business, it is not true even in a technical sense that the lessee, the Newark Central Warehouse Company, is "a shipper in interstate commerce"; and it is not true that the Jersey Central through its lease of the warehouse "bears directly a portion of the expense of commercial operations" of the lessee; nor is it true that the respondent "reduces below the published tariff rates" the transportation charge on shipments stored by the Newark Central Warehouse Co., nor is it true that the respondent discriminates in favor of the lessee or its patrons in violation of Section 2 or 3 of the Commerce Act.

[fol. 255] All of the evidence before the Commission in reference to this lease is contained in pages 3333 to 3417, 3835-8 and Exhibits A42, A43 and A59 of the record. Additional evidence regarding the warehouse submitted prior to the making of the lease is in the record at pages 1456, 1459-60, 1495 and Exhibit 30. An examination of that part of the record, it is believed, will convince the Commission that there is no substantial evidence to support the vital findings referred to above.

(2) The Findings Quoted Above Are Contrary to the "indisputable character of the evidence" Before the Commission

In the original Report in this case, 198 I. C. C. at 154, the following finding appeared:

* The effective date of the order was subsequently postponed to Dec. 1, 1936, and still later to Feb. 1, 1937.

"The Newark warehouse was constructed and financed by the Jersey Central as a medium through which traffic would be attracted to its line."

Since operating rather than traffic considerations provided the primary reason for the construction of the warehouse over thirty years ago, the Respondent at a subsequent hearing in this case, on July 2, 1935, submitted testimony which has not been and cannot be controverted, as to the reasons for the construction of the building. Mr. Hamilton, Vice President and Freight Traffic Manager of the Respondent, who was the agent in charge of Respondent's terminals in Newark in 1906 when the warehouse was completed, testified that although Newark in 1906 had a population of about 250,000 people "there was no warehouse [fol. 256] of any consequence in Newark at that time." Moreover, demurrage rules were not then in force in that region and the result was that merchants were in the habit of leaving their freight in the Respondent's cars, giving rise to serious terminal congestion. These conditions led to a request by numerous merchants that the railroad construct a warehouse. The warehouse was built to meet this public demand and to relieve the congestion resulting from lack of storage facilities. The attracting of traffic, according to Mr. Hamilton, was only an incidental consideration in the building of the warehouse (Rec. 3340-41).

The Commission's final report, on Sheet 26 notes the above testimony, but immediately adds

"The record is conclusive, however, that the warehouse is an adjunct of the railroad's traffic department and that the latter has made continuous and intensive efforts to solicit traffic over its line for storage in the warehouse."

It is respectfully submitted that this emphasis of the Report on the traffic motive is not justified by anything in the record and it tends to obscure the uncontroverted fact that the warehouse was constructed primarily to meet a public need for storage service and to reduce serious terminal congestion.

The evidence also shows that the warehouse was originally designed to provide a central less-than-carload station in Newark and the first floor was used exclusively for that purpose from 1906 until about 1932, when owing to the diversion of the Respondent's l.c.l. traffic to the trucks,

[fol. 257] the L.C.I. station at that location seemed no longer needed.

In view of the fact that the warehouse had been operated at a large deficit for many years, and it was decided in 1932 that the first floor of the warehouse was no longer needed for railroad use as a freight station, extensive efforts were made to find a purchaser or a tenant for the building. Mr. Hamilton testified at length that efforts were made subsequent to 1932 to dispose of the building without any regard to traffic considerations. Owing to the heavy taxes assessed against it, and the fact that the nearby Army Base, with 2,000,000 square feet of storage space, was tax exempt and had been leased to a competing warehouse company at a nominal rental, the deficit caused by the warehouse increased rapidly. The result was that the warehouse became a serious real estate liability to Respondent, and since Respondent itself was operating at an annual deficit of over \$1,500,000, disposition of this idle property became one of Respondent's pressing problems.

Active steps were taken in several directions to find a purchaser or tenant for the structure. Over 100 prospects were interviewed in the effort to sell or lease the property "to any kind of a tenant for any part of the warehouse, either an office tenant or a storage tenant or a manufacturer, or any kind of a tenant whatever, whether it meant traffic to the railroad or not." Studies were made for converting the warehouse into a public garage but this proved impractical owing to the design of the structure. Negotiations were conducted with Bamberger & Company, a large department store, and with the Western Union [fol. 258] Telegraph Company to purchase or lease the property for private storage purposes. It was pleaded with Fiest & Fiest, a large real estate broker, to find a tenant. All efforts to either sell or lease the structure proved unavailing for over a year (Rec. 3345-7).

After steps to sell or secure a tenant for the property without regard to traffic considerations had failed, negotiations were undertaken which resulted in the lease, which became effective July 1, 1934, to the Newark Central Warehouse Company, under which that company has been and still is operating the warehouse on a profit-sharing basis. It is true that during the first 2 years of operation the rents received by The Central Railroad Company of New

Jersey has not been sufficient to pay the taxes. On the other hand the business of the warehouse company is steadily increasing and in view of the profit-sharing arrangement there is a reasonable prospect that the rental provided for in the lease will ultimately be sufficient to pay taxes and maintenance, and provide some return on the investment.

From the evidence it is entirely clear that the lessee is a bona fide warehouse company. This is not a case where a large shipper is masquerading as a warehouseman. No allowances of any kind are paid by the railroad to the warehouse company such as were involved in the Merchants Warehouse Case, 283 U. S. 501. The report to be sure refers to the lessee as "a shipper," but to justify this designation it refers to sporadic instances where the lessee, on instructions of the real shipper, has employed pool cars or followed the shippers' instructions as to the billing of particular shipments. There is no suggestion [fol. 259] that the lessee is a forwarding company or is receiving any direct rate concession or preference in service or acts in any capacity other than that of an ordinary bona fide commercial warehouse company.

The evidence shows that the warehouse has at no time since the lease was executed been anywhere near filled to capacity. The record shows that in July, 1935 the warehouse was occupied to only 25% of capacity (R. 3382). There is no suggestion that the lessee has not welcomed all the business that was offered by any shippers without discrimination.

The lease contains no provision as to the routing of traffic and there is no basis in the record for any suggestion that the lessee has not dealt precisely the same with patrons who ship exclusively by truck or other railroads as patrons who route their traffic over Respondent's rails.

In the light of the above state of the record, it is submitted that the evidence before the Commission squarely refutes the finding that the warehouse is being used "as an adjunct of Respondent's traffic department," or that the lessee "is a shipper," or that the Railroad Company indirectly, through the warehouse company, is preferring some shippers over others, or is indirectly defeating its traffic rates.

(3) The Findings and Order Rest Upon Clear Error of Law

The findings on Sheet 30 of the Report rest upon the legally erroneous assumption that a carrier subject to the Commerce Act cannot, without violating the provisions of [fol. 260] said Act or of the Elkins Act, lease a warehouse to a commercial warehouse company at a rental less than a sum equal to taxes, maintenance, depreciation and a return on investment.

It will at once be apparent that this basic assumption of which the Order rests is of very far-reaching importance. The question involved is not a new one. It was very fully investigated by the Commission years ago, and in a decision that has guided the carriers of the country in their leasing of property for many years, i.e. Leases and Grants By Carriers to Shippers, 73 I. C. C. 671 at 683, the Commission promulgated a sound ruling on the question in the following sentence:

"Every effort should be made by carriers to obtain, when leasing land to shippers, terms no less favorable than would be obtained, under similar conditions and restrictions of use, *were the land owned independently of the railroad.*"

This ruling required that carriers, in leasing property to shippers, should not permit traffic considerations to influence the amount of the rental or the terms of the lease, but should bargain for precisely the same rent and the same terms and conditions as would be sought in the open market by an owner in no way interested in transportation. That ruling was sound in policy and defensible in law.

The present Report and Order undertake to impose on carriers subject to the Act a wholly new and arbitrary standard. It rests on the premise that in view of the prohibitions against rebating by any kind of a device, the Commission is now justified in setting up a special rule for fix- [fol. 261] ing minimum permissible rentals to be charged by railroads when they make leases to shippers which will provide annually a sum equal to taxes, maintenance, depreciation and a return on investment, wholly regardless of current market value, supply and demand, and the other considerations which ordinarily control in the fixing of rents.

No court or Commission decision has been or can be cited in support of such an extraordinary doctrine. On the contrary, the proposed rule, which would prohibit a carrier from fairly competing with other owners of real estate with due regard to current market conditions, proposes a minimum basis of rental of railroad property which, if applied in the present instance, would render the renting of this particular structure impossible. Since this property is of substantial value, and the railroad has no use for it and has been unable to sell it, a virtual prohibition against renting it from year to year on the best terms obtainable would amount to a clear taking of property without due process of law, in violation of the Fifth Amendment.

The fact is that while the complaining warehouse interests nominally complain of violations of the Commerce Act they in fact rest their hopes on a request that the Commission exercise the legislative function of forcing "the carriers entirely out of the warehousing business" (see Sheet 6 of Report). Congress has not attempted to confer any such power on the Commission and of course any such attempt that gave the Commission power to destroy property would conflict with the Constitution.

[fol. 262]

Summary

In order to condense the present statement the joint Petition for Rehearing, Reargument and Reconsideration filed by the Respondents dated August 29th, 1936, is expressly adopted by this Respondent and made a part hereof as though set forth in extenso.

This Respondent's position is that the findings on Sheets 26 to 30 of the Report respecting its lease of the Newark Warehouse should be rescinded and the Order based thereon vacated, because, First,—there is no evidence to support said findings; Second,—said findings are in direct conflict with the affirmative and uncontroverted evidence before the Commission; and, Third,—said findings and the Order based thereon rest upon a clear error of law. If notwithstanding these exceptions the Commission inclines to adhere to said findings and Order, then this Respondent requests that the effective date of the Commission's Order be further postponed and a further hearing be granted at which Respondent offers to prove:

(1) That its primary purpose in constructing the Newark Warehouse about 1906 was to meet a pressing public need for warehouse facilities in order to release its equipment and reduce the serious continuing terminal congestion in the Newark area;

(2) That since 1932, when Respondent discontinued use of said warehouse as a freight station, it has diligently endeavored to sell said warehouse, and failing in that effort, [fol. 263] has made the best possible arrangements for so leasing it as to secure the maximum possible rental;

(3) That since the present lease was entered into, on July 1, 1934, the warehouse has never been filled to capacity and that its facilities have been available without discrimination to every shipper who applied for storage service;

(4) That in connection with the lease there has been no requirement or understanding, express or implied, that the lessee forward or receive traffic handled in the warehouse via any particular carrier, and there has been no understanding or agreement, express or implied, between the Railroad Company and the lessee, or any of its patrons, by which the warehouse charges or services were connected up in any way with the rail haul so that the charges or services of the lessee could effect in any manner or by any device the integrity of the rail rates (at present about 15% of the inbound and 75% of the outbound business of the warehouse moves by truck);

(5) That rates for storage charged by the Newark Central Warehouse Company were on the same general level as rates charged by its competitors in Newark and vicinity;

(6) That if the Respondent were forbidden to rent said warehouse at less than the sum of the taxes, depreciation, maintenance, and even a four per cent return on the investment, the resulting minimum permissible rental, would eliminate any possibility of finding a tenant for said warehouse, [fol. 264] and this would amount to a taking of property in violation of the Fifth Amendment.

Wherefore, the Respondent prays that the Commission rescind the findings above quoted, and vacate the part of its Order above quoted, on the evidence of record, or, in the alternative, that the Commission further postpone the

effective date of its Order and grant a further hearing at which the additional proof above outlined and other evidence may be presented.

Respectfully submitted, Alex. M. Elder, Counsel for Respondent.

Dated November 21, 1936.

[fols. 265-266] EXHIBIT "J" TO PETITION

(Referred to in Paragraph XIII of Petition)

Separate petition of Lehigh Valley Railroad Company, dated September 29, 1936, for rehearing, reargument and reconsideration of the Commission's report and order of June 8, 1936. Copy attached hereto.

[fol. 267]

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[fol. 268] BEFORE THE INTERSTATE COMMERCE COMMISSION

Ex Parte No. 104, Part VI

Practices of Carriers Affecting Operating Revenues or
Expenses

Part VI. Warehousing and Storage of Property by
Carriers at Port of New York, N. Y.

Petition of Lehigh Valley Railroad Company for Rehearing,
Reargument and Reconsideration

Comes now the Lehigh Valley Railroad Company, one of the respondents in the above entitled proceeding, and petitions the Interstate Commerce Commission for rehearing, reargument and reconsideration of those portions of its report and order on further hearing therein relating to this respondent, and in support of said petition respectfully shows:

I. Statement

The specific findings on sheets 25-26 and 55 of the report with respect to the Lehigh Valley, although nine in number, are but two in substance. The first is that the Lehigh Valley is guilty of reducing its published tariff rates in favor of certain shippers by means of leases to them of space in its [fol. 269] buildings at alleged non-compensatory rentals. The second is that by granting such alleged concessions or departures from the tariffs the Lehigh Valley is guilty of unjust discrimination and undue preferences in violation of sections 2 and 3 of the Act, as well as a departure from its published tariffs in violation of section 6.

For the reasons hereinafter set forth, this respondent respectfully submits that neither of these conclusions is supported by the evidence, nor is in accordance with the facts that can be presented at the further hearing herein requested, and should, therefore, be eliminated from the report and order.

II

Point I

The Lehigh Valley is not guilty of reducing its published tariff rates, because the rentals for the space it leases and

the charges for the services it performs meet the standard of compensativeness set by the Commission and the courts.

1. Leases in Buildings and on Piers

The charge of granting unlawful concessions from published tariffs rests upon the first seven of the summarized findings on sheet 25.

In substance these are that this respondent allows certain shippers to occupy space in its premises free of rent for a period; that in other cases the rental is determined by bargaining, and in still others that certain alterations of the premises leased are made at railroad expense. The basis of [fol. 270] the general charge of non-compensatory return and, hence, the basis upon which all the alleged rebating rests is simply that the return derived therefrom by the Lehigh Valley fails to cover both interest and depreciation, in addition to 6% or some other theoretically adequate return upon the investment in the properties. That this, and nothing else, is the basis of the asserted non-compensatory return is manifest from the reference on sheet 4 of the report to Appendices I and II purporting to show investment and losses, and from the statements on sheets 22, 23 and 24 concerning the alleged losses from the operations of National Stores, the Bronx Lehigh Building and the Starrett-Lehigh Building, respectively. There is no finding, because, of course, the record contains no evidence that would support one, that in the hands of owners and operators wholly divorced from all relation to the Lehigh Valley, all or any single one of these properties, in 1935 or any year, could or would have made a better showing than the report recites they did make.

Since all the unlawful concessions claimed are predicated exclusively upon this finding of non-compensativeness in the rental return, the pertinent question is, What is the measure of the return the law requires the Lehigh Valley to get for such non-carrier facilities before incurring the taint of rebating? The answer is found in the standard set by the Commission in Leases and Grants By Carriers to Shippers, 73 I. C. C. 671, 683, also cited in the report, wherein it said:

"Every effort should be made by carriers to obtain, when leasing land to shippers, terms no less favorable than would be obtained, under similar conditions and restrictions of use,

were the land owned independently of the railroad." (Italics supplied.)

[fol. 271] This basic principle is indeed endorsed on sheet 44 and again on sheet 54 of the report in this case, on the latter of which it is stated:

"It cannot be doubted that to the extent that a shipper escapes payment of a *reasonable* storage or insurance rate there is a deduction from the sum of the transportation rates . . . Loans of money by carriers to shippers at less than the *prevailing* rate of interest are unlawful. *Vandalia R. R. vs. U. S.*, 226 Fed. 713." (Italics supplied.)

Plainly, this standard of adequate return, set by both the Commission and the Federal Court, is not rigid, but elastic. It is tempered by the rule of reason and practicability. Adequacy of return in a case such as this, where the only question is whether it does or does not amount to an unlawful concession or rebate, depends upon the "effort" made by the Lehigh Valley to secure it; upon what is reasonable under the attending circumstances and conditions; upon the "prevailing rate", and upon what reasonably prudent and capable independent owners of similar facilities secure under like conditions.

In the *Vandalia* case, cited on sheet 54 in this report, it is true that a carrier that borrowed money at 4% and loaned it to a coal company on its line at 2% was held guilty of rebating. But, the significant fact in that decision is the plain and definite statement therein that the 2% rate at which the loan to the coal company was made "was far below the market rate", and that the coal company "was not in a position to borrow it at 2% interest as a regular banking proposition or from any ordinary sources." It was the grant of [fol. 272] something by the railroad company to the shipper at a rate not elsewhere available to the shipper that constituted the unlawful concession.

Such a situation is wholly absent in connection with the leases made and services rendered by the Lehigh Valley. It is not found as a fact in the report, nor does the evidence of record suggest that the rentals at which the Lehigh Valley leases its facilities to either shippers or others are in any sense lower than the prevailing rates for like facilities in the New York harbor real estate market. There is no proof that the lessees of the Lehigh Valley are given

anything they could not get elsewhere in the open real estate market of New York harbor. On the contrary, the testimony of witnesses Hildum and Crotaley stands undisputed that no efforts are spared to secure the reasonable and going rates; that rentals are fixed and determined in the same way as is done by private owners (3750, 3754, 3790-99); that leases are not confined to shippers, but are offered to anyone willing to pay such rates; that leases are actually refused to prospective tenants unwilling to pay such going rates even though they are large shippers (3754); that the tenant receiving the largest so-called concession is not a shipper at all (3761); and that not more than 40% of the tenants are shippers (3761). This definite testimony, of the highest relevancy and significance on the question of the asserted rebating, is given no effect in the conclusions reached in the report.

The very best evidence that the rentals secured by this respondent are not lower than are elsewhere available to tenants and are not lower than private owners of like facilities exact, lies in the fact, stated on sheets 22 and 23 [fol. 273] of the report, that both the Bronx-Lehigh Building and the Starrett-Lehigh Building are far from rented to their full capacities. Can it be supposed that if this respondent were granting leases at less than the going or prevailing rates there would be any such vacancy in either of these modern buildings?

All these definite and uncontradicted points in the evidence of record are directly disregarded in the conclusion that this respondent leases at less than the prevailing rates and thereby grants rebates.

This record, we respectfully submit, contains no evidence even tending to support a finding that the Lehigh Valley has made inadequate efforts to secure higher returns from the use of any of its properties, or that under the conditions private owners did or would secure greater returns. Yet such a showing is jurisdictional and indispensable, by the standard of both the Commission and the courts, before a valid order will lie commanding the Lehigh Valley arbitrarily to increase all charges, which, because of the impossibility of doing so, means the closing and the discontinuance of the use of the facilities. Until such showing is made there is no proof that the shipper has received anything from the railroad not elsewhere available to him

in the open real estate market, and, under the discussion in the Vandalia case, no foundation for the charge of granting unlawful concessions from tariffs.

Much is made of the point that when interest and depreciation are included the Starrett-Lehigh Building and the Bronx-Lehigh Building are unprofitable properties, notwithstanding they otherwise show a profit. Predicating un-[fol. 274] profitableness of the whole buildings upon that theory, it is then concluded in the report and order that if the buildings as a whole are thus unprofitable it follows necessarily that that fact alone proves that the Lehigh Valley is rebating to the extent of such unprofitableness to the shipper patrons of the buildings.

There are two fallacies in the argument. In the first place, unprofitableness of the buildings, even if it were true, is no proof that patrons of such properties are thereby receiving rebates. As stated in the dissenting opinion of Mr. Commissioner Mahaffie, there are many reasons why such buildings may be operated at a loss that have no connection at all with concessions to or preferences of shippers or with the question whether the rates for space therein are or are not reasonable. Until these other causes of the alleged unprofitableness are eliminated; the fact of unprofitableness cannot validly be accepted, as it is in the report, as proof of departure from the Lehigh Valley's tariff rates.

The second and equally important fallacy in the conclusion lies in the fact, already shown, that unprofitableness in the rebate sense is not shown in connection with either of these buildings. The Starrett-Lehigh Building, the larger of the two was admittedly forced upon the Lehigh Valley by bankruptcy proceedings. The testimony that the Lehigh Valley's handling charges in the building are compensatory is not questioned (Sheet 23). The Company, having inherited the building as it did, is not told how it could have done or hereafter can do better than it has done. A condition—not a theory—confronted the Company. Without proof that private owners could have done better, or that the Lehigh Valley did less in securing adequate rental: [fol. 275] than it might reasonably have done, or got less than the "prevailing rate", or gave its tenants something not otherwise available to them, there is a manifest lack, by the standard set up by the Commission and the courts, of any basis for the present order. This order, instead of

lessening the Lehigh Valley's burden, will necessarily aggravate it into a loss that is total without any improvement in the situation of any shipper.

The utter impracticability of higher charges for these Lehigh Valley facilities under present real estate conditions in the New York district is evident from the finding on sheet 5 that, "There is not enough business to fill all of the warehouses in the Port of New York district", and from the further finding on the same sheet that even before much of the railroads' own storage space was put on the market there was a surplus of the privately owned space. In such circumstances the idea of a further increase in rental rates, or if any change in the interest of the shipping public by reason of any such increase, is but fanciful.

It follows that the competitive results of an oversupply of warehouse space obtain among private owners without regard to the facilities owned by the Lehigh Valley or other railroads. There is no evidence of any greater ability among private owners to maintain a "fixed standard of rates for storage", (Sheet 5) than among railroad owners. And the fact that, entirely aside from the railroad facilities, there is, as found on sheet 5, an excess supply of private warehouse facilities, is conclusive that conditions complained of by the private owners (Sheet 6) are inherent in their own industry and obviously would continue even if [fol. 276] the Lehigh Valley's facilities were withdrawn entirely from the field.

That the rental revenues of the Lehigh Valley are in reality not unlawfully low, that is, so low as to constitute a rebate, is further revealed by the illuminating finding made in the original decision and repeated on sheet 6 of the instant report, that:

"Although the complaint originally *seemed* directed to the measure of the charges made by the carriers for their warehousing services, and a great deal of evidence was offered by private warehousing interests going to that matter, it was *emphasized* at the hearing that *the real intent and purpose* of the complaining warehousemen is to get the carriers entirely out of the warehousing business." (Italics supplied).

The private warehousemen are fully cognizant of the fatality of claiming that railroad warehouse rates are out of line with their own rates in a field which they themselves

overcrowd. Unable to prove their complaint against the "measure of the charges" for railroad warehouse facilities, their real intent and purpose", as the Commission rightly finds, is to oust the railroads completely from the warehouse field. The Commission admits it has no jurisdiction to do that as such (Sheet 52), yet in direct effect the order it has entered does no less, because any increase in the Lehigh Valley's rentals means closing its facilities, although the proof does not justify condemning its present rentals as unlawfully low in view of the Commission's own standard and complainants' stated abandonment of such claim.

The order, therefore, that the Lehigh Valley must arbitrarily increase all its warehouse rentals or be guilty of a [fol. 277] rebate is an order not only to raise its rates above and beyond the "prevailing" level, but an order to do a vain and impossible thing—an order which, in last analysis, requires the Lehigh Valley to close up its facilities and abandon their use, without any resulting advantage to any shipper. Such an order is so contrary to the evidence, the rule of reason and the Commission's own standard as to be arbitrary and therefore void as a violation of the Fifth Amendment.

The other kind of leases by which the Lehigh Valley is charged with granting tariff concessions is its leases of pier space to shippers. On sheet 21 of the report, and elsewhere, it is emphasized that the lessee's purpose in securing such leases is thereby to avoid the application of the higher punitive storage charges, and because of such motive the inference, if not the statement, is made that such leases become thereby illegal concessions.

Witness McIntyre testified that published storage rates of rail carriers for storage on their New York harbor piers are punitive in amount and are intended thereby to force the removal of freight from railroad property rather than to compensate for its storage thereon (3725). Such punitive rates are, of course, not applicable to freight held in the shipper's owned or leased space.

There is no finding in the report and no suggestion in the record anywhere that the Lehigh Valley does not have surplus space on its New York harbor piers, or that the extent to which it has leased the same pursuant to its tariff provisions has in any way incapacitated it in the performance of its transportation service. The real question, therefore, is

as to the validity of the leases rather than the motive of the lessee in securing them, or the fact, commented upon in the [fol. 278] report, that the Lehigh Valley opposed discontinuance of the practice of making such leases (Sheet 21, 43). If a carrier has a right to lease its surplus space, as it unquestionably does under the Commission's decision in *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, there is no reason for the statement, so frequently emphasized in the report, that such a lease, valid as it is, enables the lessee to avoid payment of the otherwise applicable punitive storage rates, or that the Lehigh Valley did not approve abandonment of such leases. With equal force it might as well be argued that the average demurrage agreement, whose use has long been sanctioned, is unlawful because it enables the shipper who enters into it to escape the otherwise applicable higher straight demurrage rates. There is, therefore, no point, in fact or in law, for the finding on sheet 21 of the report that leases are made by this respondent to enable shippers to avoid the punitive storage charges, and that finding should be eliminated.

On sheet 21 it is further stated that "Although it is claimed by the Lehigh Valley that these practices (allowing the pier lessees to occupy more than the leased space) have been or will be corrected, it is clearly evident that shippers who are permitted to occupy space without payment therefor are granted concessions or offsets from the published transportation charges". It is submitted that this finding is, upon the record in this case purely hypothetical and inapplicable to any state of facts proved with respect to the present or future practices of the Lehigh Valley. Any such situations as may have formerly existed have since been corrected and no longer obtain, as this record shows and as will be further shown upon rehearing. Such a hypothetical [fol. 279] or prospective observation as the one quoted could, with equal propriety, be made concerning any tariff rule or rate. It is, of course, true that the granting of any service to a shipper, "without payment therefor" is an unlawful concession, but as this record does not support any finding that the Lehigh Valley is now making or will make any lease to any flour or other shipper without payment therefor, or is now allowing or will allow any lessee to occupy more than the leased space, this finding and the wholly unfavorable inferences inherent in it, are unsupported by

the record, are therefore arbitrary, and should be eliminated upon reconsideration.

In further proof of the arbitrariness of the order to close up and abandon the Lehigh Valley's facilities, is the obvious impossibility of policing compliance with the order. That which is found unlawful is admittedly not so unless the recipient of the railroad lease is in the status of shipper. In fact, no fault at all is found with the Lehigh Valley's National Stores leases or services because the recipients thereof are not shown to be shippers (Sheet 22). It is also found that some tenants in the other Lehigh Valley facilities are not shippers (Sheet 23), and that leases are no longer limited to shippers. Can it be supposed that the Company as lessor can exact a higher rental in practice from a shipper than a non-shipper?

The anomaly is thus presented that leases of the kind condemned may admittedly continue to be lawfully made and applied by the Lehigh Valley to non-shippers, but if such lessee, of his own will and unknown to the Lehigh Valley, or indeed over the Lehigh Valley's positive objection, elects to [fol. 289] assert his legal right to ship over its line in interstate commerce, such lease, ipso facto, becomes, under the order, not only unlawful, but the Lehigh Valley, despite all it could do to prevent it, is equally tainted. We respectfully submit that the statement of such a paradox sufficiently condemns the order as arbitrary.

2. Handling Services

The finding that the Lehigh Valley is guilty of concessions from its published tariff rates rests, in part also, upon the conclusion that certain of its services of handling freight in connection with pier space leased to shippers are rendered at non-compensatory rates. On sheet 20 it is stated that "on crude rubber remaining in storage (in transit at the Lehigh Valley's Claremont Terminal) for a period of 20 months, the handling cost, and storage cost" would exceed the Lehigh Valley's division of the through rate. On the same page it is further found that on such traffic "the actual monetary loss for the storage and handling is greater than the division received by the Lehigh Valley for the transportation of the goods."

This statement incompletely and inadequately presents the true situation. The fact is, as will be fully developed at

the rehearing, that the transiting of a shipment of west-bound crude rubber at Claremont, which is a water front pier-warehouse owned by this respondent, involves but one handling service more than is involved when a like shipment moves through Claremont without transit (3707). On the through shipment without transit the Lehigh Valley, [fol. 281] under long established tariff regulations, performs at its expense the service of unloading the rubber from lighter to car. On a transit shipment it likewise performs at its expense the service of unloading from lighter to its transit space, and when the transit shipment moves out from Claremont performs the one extra handling from the transit space to the car. For this extra handling it collects from the shipper a tariff handling charge of 20 cents per ton and pays to the stevedore $34\frac{1}{2}$ cents per ton.

The costs of and revenue from this extra handling of the transit shipment cannot, however, be separately considered for the reason that whether the transit shipment remains in storage one day or thirty days, storage revenue in the amount of 30 cents per ton accrues to the Lehigh Valley under its published tariff. On a shipment in transit one month, therefore, the handling and storage revenue amount to a total of 50 cents per ton against which the charge paid by the Lehigh Valley for the one extra handling is but $34\frac{1}{2}$ cents per ton, leaving the balance applicable to the cost of storage. For each succeeding month, or fraction thereof, the rubber is held on storage-in-transit, there accrues to the Lehigh Valley, under its tariffs, storage revenue of 20 cents per ton with no expense at all for handling, until the final month in which the transit freight is moved from Claremont.

Since the actual cash income to the Lehigh Valley substantially exceeds the actual cash expenditures made by it in connection with such transiting of rubber, it becomes manifest that the only basis for the conclusion that the Lehigh Valley is losing money by the transaction, and thereby rebating in favor of the shipper, is the manner in which the cost [fol. 282] of the transit space is separately considered and calculated. There is no doubt from the report that the calculations underlying the alleged deficiency in the transit storage rate, and hence the alleged rebating in this respect, rest, like all the others do, upon the premise that transit storage charges are non-compensatory, and therefore are rebates, unless they include interest on investment over and above operating cost.

As has been shown, such a theory of unprofitableness or non-compensativeness, in the rebate sense, is untenable in law. The conception that each factor of any transportation service a railroad performs must separately pay its own way in order not to be a rebate is as untrue in fact as it is unsound in principle. If adequate return, comprehending both depreciation and interest on investment, is essential to legalize railroad activities, the whole range of such operations must stand condemned, for there is no fact of greater common knowledge than that for years railroads have notoriously failed to earn on their operations as a whole, and therefore on most of the component elements thereof, anything approaching such an adequate return. The unsoundness of any order or rule making failure to secure such a return proof of positive tariff concessions, should not require further argument.

Furthermore, the report does not show that rubber shippers do not have available to them among the complaining outside warehousemen, handling and storage charges which in the aggregate are substantially the same as those assessed by this respondent at Claremont Terminal. In proof of this is the fact that not all rubber shippers patronize Claremont, and since the conclusion of the hearings in this case the [fol. 283] Lehigh Valley has lost, as it will show at the further hearing, a large portion of the rubber traffic formerly moving through that terminal.

It is respectfully submitted therefore that the above quoted statements from sheet 20 of the report as to this respondent's rubber traffic are both incomplete and misleading in effect, do not in law establish an unlawful concession from any tariff, and should be omitted from the report.

The next service as to which it is found that the Lehigh Valley is guilty of granting unlawful concessions from its tariff rates is its service of handling flour shipments to and from space on its piers which is leased to shippers. There is in the report, however, no suggestion that the Lehigh Valley's performance of the service of handling flour into or out of leased space is not covered by proper tariff provision. With the right to make leases of surplus space, and with a tariff provision that the Lehigh Valley will perform such handling service, the question is, Does its performance constitute a rebate?

On sheet 21 particular mention is made of the service performed by the Lehigh Valley in unloading flour shipments

at pier 44. The report, manifestly, does not take into account and apparently overlooks entirely the fact that at all New York harbor pier stations all carriers, under their published exceptions to Rule 27 of the classification, perform the work of loading and unloading the freight to and from cars. If it is a rebate to unload flour at such a station all New York harbor lines from time immemorial have rebated, not only with respect to flour, but as to all other freight.

[fol. 284]

3. Insurance

The third substantive matter upon which the rebate finding against the Lehigh Valley rests, is that the so-called insurance services rendered by it are performed at non-compensatory charges and so constitute an unlawful concession. This finding, it is submitted, finds no warrant at all in the evidence or in the report itself. On sheet 55 it is recited that the Lehigh Valley "has had to pay no losses." Manifestly, it necessarily follows that the 8-cent charge admittedly collected by the Lehigh Valley represents net revenue. This was testified to by both Mr. McIntyre and Mr. Clarken (3710, 3807) and is no where contradicted. There is, in fact, therefore no basis for the generality and all-inclusiveness with which the insurance portion of the order is entered, condemning in broad-gauge fashion and without any limitation appropriate to the evidence the Lehigh Valley's services of assuming fire liability along with others on the ground that they are rendered at "less than cost". Having actually made money out of its so-called insurance practices, that portion of the order which directs cancellation of such provision in the Lehigh Valley's tariff is clearly in conflict with the testimony, is therefore arbitrary and invalid, and, upon reconsideration, should be eliminated.

The fact that the 8-cent charge is an equalized rate among all carriers for reasons of competition affords no basis, as the report (Sheet 54) indicates, for condemning it. It is a charge that is higher than the cost of the service on some lines and lower than the cost on others. But wherein is there anything new or unique in the idea of equal charges for un-
[fol. 285] equal service? There is nothing more universal in the whole field of transportation than an equality of rates between common points via all open routes notwithstanding their material differences in costs and operating conditions. The so-called insurance, as rendered by this respondent and others, is a transportation service because it "affects" . . .

the value of the service rendered" the shipper. To single it out as an item as to which a common or competitive rate may not be maintained is to take a revolutionary position, contrary to both the public interest and the whole principle of competitive rates among competing carriers.

This part of the report and order should be eliminated in so far as it pertains to the Lehigh Valley.

Point 2

The Lehigh Valley is not guilty of a violation of either Section 2 or Section 3, because the differences in its treatment of shippers stated in the report are not, in fact or in law, undue.

The second conclusion of law (Findings 7 and 8, Sheet 25) against the Lehigh Valley, is that by its practices in connection with leases to tenants and its stated failure to follow similar practices with respect to tenants in outside facilities, it is guilty of unjust discrimination and undue preferences and prejudices in violation of sections 2 and 3.

None of the specific findings upon which this conclusion as to the Lehigh Valley rests is sufficient in law or in fact to support it. The first statement in the report in this respect is the statement on sheet 21 that:

[fol. 286] "On flour stored at the Lehigh Valley's Jersey City piers, the expense of unloading the flour in the leased space and reloading it when it is distributed from such space, is borne by respondent. On the contrary, if the flour is transported to Jersey City by the Lehigh Valley, unloaded and stored in private warehouse space, and reloaded for distribution, the Lehigh Valley bears none of the expense of unloading or reloading. The only reason given for the difference in treatment of shippers who store at the Lehigh Valley piers and those who store in private warehouses was that it has long been the custom of the respondent to stand the handling expenses when flour is stored on its piers."

This statement incompletely presents the facts in the real situations of the two classes of shippers sought to be contrasted in the quotation, and is therefore incorrect, as this respondent offers to show at the rehearing herein sought. The contrast to be drawn is between, first, the situations of a flour receiver at New York harbor who stores his east-bound flour in space leased from the Lehigh Valley on one

of its Jersey City piers and the flour receiver who stores his flour in some outside warehouse in Jersey City, and, secondly, between the situations of a receiver who leases such pier space from the Lehigh Valley and a receiver who, instead of leasing space or using an outside warehouse, allows his freight to be handled over the Lehigh Valley's piers subject to the applicable railroad storage tariffs. These two groups of situations will now be considered.

[fol. 287] (a) Lessee of Pier Space Versus Patron of Outside Warehouse

The flour receiver using leased space on Lehigh Valley piers in Jersey City on which to hold it pending exportation, or ultimate delivery in the harbor, has no real advantages over the flour receiver using outside warehouse space for the same purpose. While the patron of the outside warehouse must unload the flour from the car into the storage space, it is necessary when the flour moves out for ultimate delivery in the harbor for the Lehigh Valley to switch in an empty car for reloading by the patron and then to move the same from the outside warehouse after reloading to the water front where the further unloading of the flour from car to lighter is performed by the Lehigh Valley.

In the case of flour stored in leased space on Lehigh Valley Jersey City piers, on the other hand, the tariff provides that the carrier will unload it into the leased space without separate additional charge, but, as witness McIntyre testified, this circumstance is taken into account in fixing the rental to be paid by such lessee. More important, however, is the fact that such service of unloading into the leased space is, in point of fact and practice, no more burdensome than is the unloading service which the Lehigh Valley regularly performs in unloading eastbound freight which is not to be stored in any leased space, from car to pier at Jersey City. Both the leased and the unleased space are on the same floor of the pier, so that placing the flour of the lessee within the confines of his leased floor area imposes no greater burden than this respondent customarily performs in unloading [fol. 288] flour which, after the free time, is to be held subject to tariff storage charges. When the lessee's flour moves out of the leased pier space the Lehigh Valley in moving it therefrom to the car or lighter again performs no more service than it always performs in handling outbound flour that has been held subject to railroad storage tariffs.

It is, therefore, apparent that when there is taken into account the extra service performed by the carrier in placing the loaded and empty cars at the outside warehouse the flour receiver who leases pier space from the Lehigh Valley is the recipient from it of no greater amount of service in the aggregate than is his competitor who patronizes the outside warehouse. As above pointed out, there is no proof in this record that the rentals paid by the lessee of Lehigh Valley pier space are other than the going rentals, or are any less than those paid by the patron of the outside warehouse. As between such patron and the lessee of Lehigh Valley pier space this respondent cannot, upon this record, be held guilty of any undue prejudice or preference.

The above quotation is further incomplete because it omits entirely all reference to the situation of the flour receiver who elects neither to lease pier space nor to patronize the outside warehouse. In such circumstances the flour of such receiver, upon its arrival at the Jersey City piers of the Lehigh Valley, must, under the Lehigh Valley tariff, be immediately unloaded to railroad controlled space on the piers and there held subject to certain free time allowances and thereafter to the storage rates provided in such tariff. On flour for domestic delivery free time amounts [fol. 289] to 48 hours, while on that for export it ranges from ten to fifteen days.

On a shipment for domestic delivery, therefore, which arrives and is unloaded onto the pier and is again ordered for harbor delivery by the consignee within the forty-eight hour period, the Lehigh Valley must, at its own expense, handle the flour from its position on the pier to a car or lighter for further harbor movement. In addition, it receives absolutely nothing for the use of the pier. By way of contrast, if the flour receiver is a lessee of space the Lehigh Valley receives additional revenue to the extent of the rental for the same kind and amount of handling. Likewise, an export shipment must be and is unloaded immediately upon its arrival to railroad controlled space on the Jersey City piers and when ordered out within the ten or fifteen day free period escapes all charges similar to the rental charge paid by a lessee of space, because outbound loading of the export shipment must be performed without expense to the flour owner.

At the further hearing herein sought, this respondent is prepared to prove that, upon the basis of the average detention of export flour, the costs incurred by the exporter who pays the railroad storage rate for time beyond the free period and the costs incurred by the pier-space lessee who pays the rental reserved in his lease are substantially identical. In such circumstances there can obviously be no undue preference or prejudice in favor of the space lessee and against either the non-lessee pier user or the patron of the outside warehouse, because, in point of fact, there is no difference between the really important factors in their several situations. The best answer to any finding, [fol. 290] such as is set out in the report, that the pier-space lessee occupies a position of preference and advantage is to be found in the fact that although the Lehigh Valley still has pier space available to lease to flour receivers, much flour tonnage continues to be handled in the other two ways above described.

Again, the finding that the Lehigh Valley unjustly discriminates in unloading westbound transit freight into the storage-in-transit space at Claremont Terminal while not performing such unloading service at outside transit warehouses, disregards two important facts. First, it overlooks the distinction between a water-front transit house, such as Claremont Terminal, and an inland transit house. Witness McIntyre testified without contradiction to the definite differences in point of service between the handling of westbound transit freight through Claremont Terminal and its handling through an inland transit warehouse, and showed that at an inland house the service required of a carrier is distinctly different and more than that required of the Lehigh Valley at Claremont.

By transferring freight from the lighter direct to the transit space at Claremont the Lehigh Valley does no more than it regularly does in transferring it to a car at that point for direct westbound movement without transit. On the other hand, if the shipment is to be transited at an inland warehouse, it must be handled from lighter to car at the water front just as if it were to be moved without any transit. Such car must then be set out at the inland house and delivered there the same as if final destination delivery were being made.

It is manifest from this that the placement of the freight in the transit house by the Lehigh Valley at the waterfront, [fol. 291] Claremont, is so totally different from its placement in the outside transit house that the performance of the former and not the latter by the Lehigh Valley cannot possibly be made the basis of any section 2 or 3 finding. When the freight moves out from Claremont the placement of the car is no different from the placement of the car for the outbound movement from the inland house.

The second important fact overlooked in the foregoing finding is that, in reality, the Lehigh Valley does not perform free of charge the service of unloading westbound transit freight from the lighter to the transit space at Claremont Terminal. Its tariff (I. C. C., L. V. 8750, page 61), provides that on freight having a minimum of 24,000 pounds or higher the transit storage rates for the first thirty-day period and for each succeeding fifteen-day period are 5 cents and 1½ cents, respectively, and include handling in and out of the transit storage space, while on freight having a lower carload minimum the rates for the first thirty-day and each succeeding fifteen-day period are, respectively, 8 cents and 3 cents, which, likewise, include handling in and out of the transit space. The very fact that for the first thirty-day period the storage rate is substantially higher than for each succeeding storage period is conclusive that the initial rate takes into account the handling cost.

In these circumstances, it is submitted that it cannot, in point of law, be properly held that the Lehigh Valley's unloading of the freight into the transit space at Claremont is an undue preference or an unjust discrimination in violation of either sections 2 or 3. It is a difference in treatment that accords only with and is justified by the distinct differences in the circumstances and conditions of the shippers at the two locations. It is, therefore, not unlawful, [fol. 292] and the report should be revised accordingly upon reconsideration.

The next statement upon which the unsound finding of unlawful discrimination and prejudice rests is the one on sheets 21 and 42 of the report that shippers who become lessees of space from the Lehigh Valley obtain thereby the

advantage of being able to avoid the payment of the punitive storage charges which have been referred to. It has already been shown, under Point I above, that there can be no undue discrimination or prejudice by reason of such difference in this respect as exists between a lessee and a non-lessee shipper.

Another item of alleged discrimination and prejudice is the statement on sheet 42 that,

"The record is conclusive that through existing arrangements the respondents have provided flour storage space at less than cost."

It has also been shown, under Point I above, that this finding, in so far as it relates to the flour leases made by this respondent, is contrary both to the facts of the record and the law as settled by both the Commission and the Federal Courts. What was there said will not be here repeated, but it demonstrates, we respectfully submit, that the Lehigh Valley leases do not place the holders and the non-holders thereof in any such relationship that their differences are in any sense undue, within the meaning of the statute.

Likewise, the differences between the rates of rental charged different tenants in the Starrett-Lehigh Building and the Bronx-Lehigh Building (Sheets 22-25) are differences dependent upon and directly related to differences in the size, location and other desirability of the space occupied. The testimony of witnesses Hildum and Crottsley in this respect is not disputed. Shipper-tenants in those buildings are no differently related to each other with respect to their leases, the rates paid thereunder or the terms and privileges accorded them, than they would be if they were tenants in an outside building. Indeed, the report makes no such statement. Obviously, in this respect, as in all the others, the Lehigh Valley is guilty of no undue discrimination or undue prejudice between shippers.

Having shown, under Point I above, that the rates of rental received by the Lehigh Valley are the going rates and that its practices incident to the making of leases are the common practices of private owners in the New York district, it must of necessity follow that any shipper who pays the Lehigh Valley its rates for the use of leased space

and thereafter pays the Lehigh Valley's published tariff charges for transportation is in exactly the same position as he would be if he paid the same going rates to an outside lesser for similar space and then paid the Lehigh Valley's published transportation charges on the same freight to the same destination. There is no where in the report any finding that shippers in the two sets of circumstances stated, do, in fact, receive their warehousing and transportation at any different aggregate cost. But, without such proof there is, it is respectfully submitted, no basis in fact or law for a finding that either section 3 or section 2 has been violated by this respondent.

It is well settled that a mere difference in transportation rates, or other treatment, accorded by carriers, is not sufficient to establish an infraction of either of these sections. The difference condemned by the statute is one [fol. 294] that in fact is undue, and until such undue character of any difference is established no ground exists for finding that either of these sections is violated. This rule is cited with approval on sheet 48 of the report.

It is not disputed that railroads may lawfully lease surplus facilities (Sheet 44). Obviously, the tenant of any such facilities has certain advantages which are not or cannot be availed of by others who are either unwilling to lease or, because of the limited supply, are unable to lease. Such discrimination, however, it is well settled, is not undue and therefore not unlawful. *Andrews Bros. Inc. v. P. R. R. et al.*, 123 I. C. C. 733, 740; *Williams-Thompson Co. v. A. & W. P. Ry. Co.*; et al, 126 I. C. C. 417. The degree of the advantages, whatever they may be, secured by any tenants of space leased from the Lehigh Valley is no greater than that enjoyed by the tenants whose leases and other privileges were dealt with and approved in the cases cited.

If the leasing of storage facilities or rendering of services which can be or are availed of by only a limited number of shippers, is unlawful on the theory that the return does not cover, in these depression days, full depreciation and interest, or on the theory that such lessees have certain benefits therefrom, it follows by the same token that a carrier is equally guilty of unjust discrimination and undue prejudice in providing, at less than similarly computed

costs, a dinner in a dining car which is availed of only by a limited number of those who can or may travel.

The foregoing suffices to make clear that any view that each element of every service must separately pay its way to avoid illegality, or that the accrual of benefits therefrom [fol. 295] to the recipient of such service vitiates it, is wholly theoretical, entirely impracticable in fact, and therefore not required in point of law.

The Lehigh Valley respectfully petitions the Commission to reconsider the facts of record with respect to these findings of unjust discrimination and undue prejudice by it, and, upon such reconsideration, to eliminate them from the report.

III. Conclusion

While this respondent's position is that the findings against it are contrary to the record as made and should therefore be revised upon reconsideration as above set forth, it offers to prove by competent witnesses, at a rehearing which it hereby respectfully requests, the facts above set forth, including proof that all its facilities dealt with in the report are now rented at rates that, under present conditions, are as high as are obtainable; that all its practices in negotiating leases and in determining the rentals reserved therein and the terms thereof are not different in substance or effect from what are common and standard practices in such respects among independent owners of such facilities in the New York district, and that the freight revenues received from shipments made by all its tenants combined are, in any event, so insignificant as in law to preclude any finding that any so-called concessions received by its tenants under present practices can properly be called undue or unjust or otherwise illegal, and that any differences in the treatment of shippers using and not using leased space in Lehigh Valley premises are justified by material differences in the circumstances and conditions. [fol. 296] This respondent respectfully prays therefore that this proceeding be reopened for reconsideration of the report and order as it relates to this respondent and that said report and order, upon such reconsideration and after oral argument which is hereby requested be revised as hereinabove set forth, and, in the alternative, this respondent further prays that this proceeding be reopened for further

hearing upon the issues of fact to which reference has been made.

R. W. Barrett, E. H. Burgess, Counsel for Petitioner,
143 Liberty Street, New York, N. Y.

Dated September 29, 1936.

[fols. 297-298] EXHIBIT "K" TO PETITION

(Referred to in Paragraph XIII of Petition)

Separate petition of The New York Central Railroad Company, dated September 24, 1936, for rehearing, reargument and reconsideration of the Commission's report and order of June 8, 1936. Copy attached hereto.

[fol. 299] BEFORE THE INTERSTATE COMMERCE COMMISSION
Ex Parte No. 104, Part 6

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property By Carriers at Port of New York, N. Y.

PETITION FOR REHEARING, REARGUMENT AND RECONSIDERATION
ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY

Comes now The New York Central Railroad Company, a respondent herein, and files this its petition for rehearing, reargument and reconsideration, particularly with respect to that part of the Commission's report and order on further hearing which deals with the facilities maintained by that carrier in the Port of New York district, and in support thereof petitioner shows to the Commission:

I

At page 332 of its report, 216 I. C. C. 291, the Commission incorporated a summary of its principal findings of fact with reference to the facilities of the New York Central. The first of these three findings is as follows:

"The New York Central leases warehouse space to the Mellish Company and the Auto Storage Company, shippers [fol. 300] in interstate commerce over said railroad's line;

at rental charges which fail to compensate said railroad for the cost of providing said space, thereby assuming a portion of the expense of commercial operations of said companies."

It is clear that this finding is erroneous and based upon a misconception of the applicable principle of law. In *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, the Commission stated as one of the "underlying principles" which "should govern carriers in the leasing of lands to shippers" that:

"Every effort should be made by carriers to obtain, when leasing land to shippers, terms no less favorable than would be obtained, under similar conditions and restrictions of use, were the land owned independently of the railroad."

In the case of the leases in question, there is not the slightest suggestion in the record that were the buildings owned "independently of the railroad" a higher rental would be produced. The mere fact that the New York Central may have failed to earn 6 per cent on the cost of constructing these facilities from the day of their completion out of revenues received from tenants is beside the point. For these buildings serve as stations too, and through them is handled large quantities of freight for the public within the free time period. But more than this, there is no indication in the record that were the buildings owned "independently of the railroad" a return of 6 per cent on the cost thereof could have been even approached during the years under review.

[*fel. 301*] As found by the Commission at page 331 of its report, unit No. 2 of the Kingsbridge warehouse is, and has been vacant, and this is telling evidence of the lack of demand for storage space generally, including space for automobiles. In the face of this fact and the general business conditions of which the Commission should take judicial notice, to conclude that private management—divorced from the railroad—could have made the buildings pay more is only fanciful, and yet the Central was under no greater obligation, in accordance with "underlying" principle which the Commission itself has approved, than to procure the same return as if the buildings "were owned independently of the railroad."

The New York Central hereby offers to prove, through the testimony of disinterested real estate experts, that the returns from its tenants in the buildings referred to are all that could possibly be expected (and indeed more than could be expected) were they "owned independently of the railroad."

II

The second of these findings is as follows (216 I. C. C. 332):

"Certain other warehouse companies, likewise shippers in interstate commerce over the New York Central are located in the Port of New York district and are competitors of the Mellish Company and the Auto Storage Company. The New York Central does not bear any portion of the expense of conducting the commercial operations of said competing warehouse companies."

[fol. 302] On the 1932 hearing in this proceeding only one commercial warehouseman testified with relation to automobile storage and consequently, the record does not support the finding of the Commission that "certain other warehouse companies . . . in the Port of New York District . . . are competitors of the Mellish Company and the Auto Storage Company" (Rec. 1511-1525). Moreover, on the 1935 hearing, not one of the commercial warehousemen to testify was interested in automobile storage. Even the one witness who appeared only on the 1932 hearing had not been engaged in the storage of new automobiles for six years, and his warehouse was well over two miles from the nearest railroad delivery point, with no equipment to handle automobiles in live storage (Rec. 1516, 1519). Indeed, as candidly stated by this witness, "there is no private storage for automobiles, certainly on Manhattan Island . . . for new cars" (Rec. 1522).

Obviously the providing of storage facilities adjacent to railroad stations for the receipt of the heavy automobile traffic is in the public interest and avoids unnecessary handling and expense in their distribution. It is to be noted particularly that the automobile traffic to Kingsbridge did not follow the construction of the new warehouse at that point but on the contrary, as admitted by the only warehouseman to complain, was "diverted" to that point "prior

Conclusion

Wherefore, petitioner prays that this petition be granted and a rehearing or further hearing be ordered.

Respectfully submitted, Thomas P. Healy, Jervis Langdon, Jr., Counsel for Petitioner, 466 Lexington Avenue, New York, N. Y.

September 24, 1936.

[fol. 307]

EXHIBIT "L" TO PETITION

(Referred to in Paragraph XIV of Petition)

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 28th day of August, A. D., 1936

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Upon further consideration of the record in the above-entitled proceeding, and the petition filed by respondent carriers under date of August 26, 1936, for postponement of the effective date of the Commission's order dated June 8, 1936, and good cause appearing therefor:

It is ordered, That the effective date of said order, by its terms made effective October 1, 1936, be, and it is hereby, postponed to December 1, 1936.

It is further ordered, That the said order shall in all other respects remain in full force and effect.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 308]

EXHIBIT "M" TO PETITION

(Referred to in Paragraph XV of Petition)

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 12th day of October, A. D., 1936

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Upon further consideration of the record in the above-entitled proceeding, and of petitions for rehearing, reargument, and reconsideration filed on behalf of respondents therein, and good cause appearing therefor:

It is ordered, That this proceeding be, and it is hereby, reopened for reargument, and reconsideration by the Commission.

It is further ordered, That the effective date of the order in this proceeding be, and it is hereby, postponed from December 1, 1936, to February 1, 1937, and that said order shall in all other respects remain in full force and effect.

And it is further ordered, That this proceeding be, and it is hereby, set for oral argument before the Commission at its office in Washington, D. C., November 23, 1936, at 10 o'clock, a. m.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 309]

EXHIBIT "N" TO PETITION

(Referred to in Paragraph XVI of Petition)

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 23rd day of December, A. D., 1936

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, That the effective date of the order in this proceeding be, and it is hereby, postponed from February 1, 1937 to April 1, 1937, and that said order shall in all other respects remain in full force and effect.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 310]

EXHIBIT "O" TO PETITION

(Referred to in Paragraph XVII of Petition)

Report of the Interstate Commerce Commission on argument and reconsideration, Ex Parte No. 104, Part 6, Practices of Carriers Affecting Operating Revenues or Expenses — Warehousing and Storage of Property by Carriers at the Port of New York, N. Y., — I. C. C. —, decided February 2, 1937.

Interstate Commerce Commission

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

Submitted November 23, 1936. Decided February 2, 1937

Upon oral argument and reconsideration findings of original report, 198 I. C. C. 134, and of report on further hearing, 216 I. C. C. 291, affirmed, except finding in report on [fol. 311] further hearing that services provided by respondents' so-called "storage-in-transit tariffs" are not proper subjects for tariff publication. Tariffs should be published.

W. T. Pearson for Erie Railroad.

Duane E. Minard for Seaboard Terminal and Refrigeration Company.

Other appearances as shown in prior reports.

Report of the Commission on Argument and Reconsideration by the Commission

In the original report herein, 198 I. C. C. 134, we found generally that certain warehousing practices of respondent carriers resulted in violations of sections 2, 3, and 6 of the Interstate Commerce Act, and stated that there was reasonable ground for belief that the provisions of the Elkins Act were also violated. No order was entered, but respondents were admonished to take prompt corrective action. The respondents failed to comply with our findings. Accordingly by our order of May 6, 1935, we reopened the case for further hearing to bring the record down to date. At the time of the further hearing respondents were advised that orders to comply with our findings would be issued if warranted by the record. On further hearing we affirmed our previous findings with respect to the violations of the act, and entered an order requiring the respondents to cease and desist on or before October 1, 1936, from the unlawful practices found to exist, 216 I. C. C. 291. Upon

petition of respondents for postponement of the effective [fol. 312] date of the order and to grant rehearing, reargument and reconsideration, we reopened the proceeding for further argument and the effective date was postponed to February 1, 1937, and has since been further postponed to April 1, 1937. The material facts are set forth in the two prior reports, and only the facts and conclusions necessary for a proper understanding of the questions raised in respondents' petitions and on argument will be dealt with herein.

Respondents as a whole attack the report on three principal grounds. The first two are as follows: first, that we erred in requiring them to establish, for the leasing of space to shippers in their warehousing facilities, charges that will be not less than the cost to respondents of providing such space; and second, that we erred in requiring respondents to cease and desist from establishing rates to shippers for the storage, handling, and insurance of goods in their warehousing facilities at less than the cost to respondents of providing such services. The contentions of respondents with respect to the above matters relate almost entirely to our conclusions of law, although some of our findings of fact are alleged to be erroneous. The record has been carefully reconsidered and it conclusively supports our findings of fact. Numerous cases support our conclusions of law. We find the facts as stated in our previous reports to be correct, and those findings and conclusions of law with respect to the above matters are reaffirmed.

[fol. 313] The third ground urges that we erred in requiring the cancellation from our files of tariffs filed by respondents purporting to cover storage-in-transit rates, handling charges, and rates for insurance of goods while in storage, which we found in the two previous reports to be commercial services. They contend that the so-called "in-transit" storage rates, handling charges, and insurance rates are for services included within the term "transportation" as used in section 1(3) of the act, and that section 6, paragraphs (1) and (7) require that the rules and charges for such services be included in tariffs filed with the Commission. Numerous cases are cited as authority for the contention that not only are the practices and rates referred to properly the subject of tariff publication, but,

in fact, they must be published in tariffs. In reviewing our administrative practices of many years (Cf. *American Warehousemen's Assn. v. Illinois Central R. Co.*, 7 I. C. C. 556), and upon reconsideration we find and conclude that respondents are correct in their contentions that such rates and charges should be published in tariffs filed with us, and that we erred in ordering the cancellation of those tariffs on the ground that "the services provided by such tariffs are not properly subjects of tariff publication." What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such [fol. 314] services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act.

Other than as indicated herein, our findings of fact and conclusions of law as shown in the two prior reports are affirmed, and an appropriate order superseding our order of June 8, 1936, will be entered.

MAHAFFIE, Commissioner, dissenting:

For the reasons stated in my separate expression in the prior report, 216 I. C. C. 291, 356, I am unable to agree that the order now issued is justified.

[fol. 315]

EXHIBIT "P" TO PETITION

(Referred to in Paragraph XVIII of Petition)

Order of the Commission entered on February 2, 1937, accompanying report of the same date. This is the order herein sought to be enjoined, set aside, suspended and annulled.

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 24 day of February, A. D., 1937

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

It appearing, That on December 12, 1933, and on June 8, 1936, the Commission made and filed its reports in the above entitled proceeding;

It further appearing, That on the date hereof the Commission has made and filed a report on argument and reconsideration, which report and the aforesaid reports of December 12, 1933, and of June 8, 1936, are hereby referred to and made parts hereof, and the Commission having found in said reports that certain practices of respondent carriers, as therein fully described, in connection with the leasing of space, storage and handling of goods, and insurance, violate certain provisions of the Interstate Commerce Act as set forth in the said reports;

It is ordered, That the respondent carriers, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company, and The Pennsylvania Railroad Company, be, and they are hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain from permitting shippers in interstate commerce over said respondents' lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by, or affiliated with said respondents in the Port of New York district, at rates and charges which fail to compensate said respondents for the cost of providing said space;

It is further ordered, That the respondent carriers above named be, and they are hereby, notified and required to cease and desist on or before April 15, 1937, and thereafter

to abstain from storing goods shipped over said respondents' lines in interstate commerce, or providing storage space to shippers in interstate commerce over said lines for commercial storage of goods, as fully defined in said reports at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space.

[fol. 317] It is further ordered, That the respondent carriers above named be, and they are hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain from directly or indirectly handling goods incident to commercial storage as fully defined and described in said reports, at said warehouses, buildings or piers for shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost of said handling.

It is further ordered, That the respondent carriers above named (except The Central Railroad Company of New Jersey) be, and they are hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain, from insuring goods shipped over said respondents' lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York district for shippers in interstate commerce at less than the cost of providing such insurance.

It is further ordered, That the respondent carriers above-named be, and they are hereby, notified and required to cease and desist from applying, by means of tariffs now on file with this Commission on or before April 15, 1937, non-compensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

It is further ordered, That respondent, Erie Railroad Company, be, and it is hereby notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain, from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of

excessive rentals paid for space leased from said Seaboard Terminal & Refrigeration Company, as described of record and in said reports.

And it is further ordered, That respondent, The Central Railroad Company of New Jersey, be, and it is hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 321] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONSTITUTING COURT

Whereas, on the 10th day of March, 1937, plaintiffs filed their petition in the above entitled suit, seeking to have enjoined, suspended, annulled and set aside a certain order of the Interstate Commerce Commission entered on February 2, 1937, in its certain proceeding referred to as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part 6, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y., described in said petition, and praying for an interlocutory injunction suspending and restraining the enforcement, operation and execution of and setting aside said order; and further praying that the undersigned call to his assistance in the hearing and determination of this cause two other judges, of whom one shall be a Circuit Judge; it is

Ordered, that the said application be, and it is hereby, set for hearing on a date hereafter to be fixed by this Court, at the United States Court House, Room 506, in the Borough of Manhattan, City and State of New York, at 3:00 o'clock in the afternoon or as soon thereafter as counsel can be heard, and Honorable Harrie B. Chase, [fols. 322-323] United States Circuit Judge, Second Circuit, and Honorable Robert P. Patterson, United States District Judge for the Southern District of New York, are called

to the assistance of the undersigned to hear and determine the said application.

Hulbert, United States District Judge.

Dated at New York, N. Y., this 12 day of March, 1937.

A true Copy.

• Charles Weiser, Clerk. (Seal.)

[fol. 324] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed April 8, 1937

United States of America, defendant in the above-entitled cause, for answer to the petition filed therein against it, answers and says:

I

United States admits that the facts alleged in paragraphs I to XVIII, inclusive, of the petition are true, except that: (1) United States denies that the allegations of said paragraphs contain full and complete statements of the findings and conclusions stated in the Interstate Commerce Commission's reports and orders which are mentioned in said paragraphs and copies of which are annexed to the petition as Exhibits A to G, inclusive, and Exhibits O and P, and for full, complete and accurate information with respect to the Commission's findings, conclusions and statements in said reports and orders the court is respectfully referred to the full text thereof; (2) United States denies the allegation in said paragraph II that plaintiffs provide space in their said warehouses, buildings and piers for some persons who do not ship property in interstate commerce over plaintiffs' railroads; and (3) United States denies the allegation in said paragraph III that the order of the Commission therein mentioned relates "in part to matters other than transportation."

II

United States denies the matters, things and conclusions alleged in paragraphs XIX, XX, XXI, XXII, and XXIII, and the several subdivisions thereof, of the petition, and

denies that the Commission's said order of February 2, 1937, is unlawful or void for the reasons therein mentioned or for any other reason.

[fols. 325-326] Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and that said petition be dismissed with costs to the plaintiffs, and that it have such other and further orders, decrees or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. Robert H. Jackson, Assistant Attorney General. Lamar Hardy, United States Attorney.

[fol. 327] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF THE WAREHOUSEMEN'S PROTECTIVE COMMITTEE
FOR LEAVE TO INTERVENE—Filed April 8, 1937

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Warehousemen's Protective Committee, hereinafter more fully described, hereby petitions the Court to grant it permission to intervene in this case in opposition to plaintiffs, and in support of this petition in intervention shows unto this Court as follows:

I. Petitioner, The Warehousemen's Protective Committee, is composed of a large number of warehouse companies of which 57 warehouse companies are engaged in the commercial warehouse business in the Port of New York District. Its principal office is at 325 West Street, in the Borough of Manhattan, City and State of New York. It was voluntarily organized by these warehouse companies on June 8, 1931, for the purpose of resisting the invasion of the large railroad systems, common carriers, into the warehouse business and compelling these railroads to discontinue their unfair competition with non-railroad companies engaged in operating warehouses.

[fol. 328] II. From paragraph III of plaintiffs' petition it appears that the present suit is instituted under the provisions of Chapter II of the Judicial Code (U. S. C. Title 28) and more particularly under the provisions of Sec-

tion 41 (28) and Sections 43 to 48, inclusive, of said Chapter, by which suit plaintiffs seek to have this Court set aside and annul, enjoin and restrain the enforcement of a certain cease and desist order made and entered by the Interstate Commerce Commission in an investigation on its own motion entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part 6, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y.*, on the docket of the Interstate Commerce Commission. Three reports in support of said order were issued by the Commission, namely, *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134; decided on December 12, 1933; 216 I. C. C. 291, decided on June 8, 1936; and 220 I. C. C. 102, decided on February 2, 1937.

III. In its said reports the Commission, among other things, found that plaintiffs performed commercial warehousing services and afforded warehouse space (non-transportation services) at subnormal rates and charges including rates and charges below the costs of performing the services and granted unlawful rebates, concessions, unjust discriminations and undue preferences to certain warehouse companies including Baltimore and Ohio Stores, Inc., the Newark Warehouse Company, the Lehigh-Harlem River and Terminal Warehouse Company, the Pennsylvania Dock and Warehouse Company, the General Cold Storage Company, Harborside Warehouse Company, Inc., Lackawanna Warehouses, Inc., the Jay A. Melish Company, and the Seaboard Terminal and Refrigeration Company. Further, the Commission [fol. 329] found in substance that the plaintiffs in indulging in these practices had violated, and were continuing to violate Sections 2, 3 and 6 (7) and other sections of the Interstate Commerce Act and that there were reasonable grounds for the belief that plaintiffs also had violated, and were continuing to violate, Section 1 of the Elkins Act.

IV. In its said cease and desist order the Commission required the plaintiffs to discontinue much, if not all, of said unlawful conduct and practices.

V. (a) More than 50 companies¹ engaged in operating warehouses in the Port of New York District, these com-

¹ The names and addresses of these companies are shown in Exhibit No. 150 in the proceeding before the Interstate Commerce Commission.

to the construction" of the facility against which he testified in 1932 (Rec. 1517-1520). There is nothing in the record to suggest that such loss as this one complainant may have sustained almost a decade ago was not owing to the [fol. 303] disadvantageous location of his warehouse. It is submitted that he can hardly complain of the operation of Kingsbridge warehouse since, upon the erection of this facility, the traffic had already been lost to him.

III

The third, or final of these findings is as follows (216 I. C. C. 332):

"The New York Central pays allowances to the Mellish Company and the Auto Storage Company for unloading and handling automobiles, which are commercial services not within the obligation of said railroad to perform under its line-haul rates. Allowances therefor constitute concessions from such rates."

This finding evidences a lack of understanding of the applicable tariff rules. While it is true that by general provisions of the Consolidated Freight Classification, Rule 27, the carriers declare that they will neither load nor unload carloads of freight which they transport at carload rates, a notable exception to this rule is controlling here. Item 1320 of Agent Curlett's Exceptions to Official Classification Tariff 90-C, I. C. C. No. A-496, authorizes an exception to Rule 27, above referred to, and provides that freight in carloads other than bulk freight, carried at carload rates, received or delivered at stations specified, will be loaded into or unloaded from cars by the carriers in New York City. As stated, this exception applies to New York City stations of the New York Central specified in Rule 11, N. Y. C. Circular 1299, I. C. C. N. Y. C. 16460, including Kingsbridge and 60th Street. The Commission is well [fol. 304] aware of the circumstances which require this service on the part of the carriers reaching New York; it is necessary in connection with pier station deliveries because of controlling physical conditions, and its application at stations removed from the water-front is thus compelled as a matter of competition.

It is therefore apparent that by unloading the automobiles in question into its stations at Kingsbridge and 60th Street,

the New York Central does no more than is required by the explicit rule in its published tariffs. The fact that the actual work of unloading is performed by the Mellish Company and the Auto Storage Company is immaterial since the New York Central is quite free, under the law, to pay allowances to agents for their performance of services which that carrier is obligated to provide under its tariffs. These allowances permit more efficient operation than would be possible were the Central to do the unloading with its own labor directly.

On further hearing in this matter the New York Central is prepared conclusively to show that the stations maintained by it at Kingsbridge and 60th Street are bona fide stations which are used by the public generally in the receipt and forwarding of large quantities of carload and less than carload freight within the free time period—that is freight which is not stored in the warehouse facilities provided at the same points. At both of these stations, team track traffic is also handled and in every sense of the word the facilities constitute stations at which the New York Central, under its published tariffs, is obligated to load and un-[fols. 305-306] load carload freight—in a manner exactly similar to that obtaining at other stations in New York served by other carriers. Indeed, the great bulk of the inbound automobile traffic is not stored, but delivered directly through the stations themselves to waiting consignees. The Central hereby offers to supply the Commission with further non-cumulative evidence on this point.

IV

The petition of August 26, 1936, for the postponement of the effective date of the Commission's order of June 6, 1936, in this proceeding, and the general petition for rehearing, reargument and reconsideration filed by the respondents therein, dated August 29, 1936, are expressly adopted by the petitioner, The New York Central Railroad Company, and, insofar as relative to the particular situations above discussed, are made a part hereof as though set forth in extenso.

[fols. 337-338] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed
April 9, 1937

To the Honorable Judges of said Court:

In accordance with the provisions of Section 212 of the Judicial Code (36 Stat. L. 1150, U. S. C., Tit. 28, Sec. 45a), we hereby enter the appearance of the Interstate Commerce Commission as a party defendant in the above-entitled case, and of ourselves as its counsel.

Daniel W. Knowlton. J. Stanley Payne.

[fol. 339] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April
9, 1937

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, hereinafter called the Commission, saving and reserving to itself all benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' petition contained, for answer thereunto, answers and says:

I

Answering paragraph I of the petition, the Commission admits that the allegations therein contained are true.

II

Answering paragraph II of the petition, the Commission admits that all the plaintiffs are common carriers, engaged in the transportation of property by railroad in interstate commerce, to, from, and within the Port of New York District and are subject to the Interstate Commerce Act.

[fol. 340]

III

Answering paragraph III of the petition, the Commission admits that this suit is within the jurisdiction of this Court and that the venue is properly laid within the Southern District of New York.

IV

Answering paragraph IV of the petition, the Commission admits that the allegations contained therein are true. The Commission also admits that Exhibit A to the petition, pages 41-42, is a true and correct copy of its order of July 6, 1931, instituting its general investigation into Practices of Carriers Affecting Operating Revenues or Expenses, Ex Parte 104.

V

Answering paragraph V of the petition, the Commission admits that the allegations contained therein are true. The Commission also admits that Exhibit B to the petition, pages 43-46, is a true and correct copy of its notice of January 6, 1932, instituting as Part VI of said Ex Parte 104, an inquiry entitled Warehousing and Storage of Property by Carriers at the Port of New York, N. Y., directed toward establishing facts concerning all policies, practices, services and charges in connection with warehousing and storage of freight by carriers serving the Port of New York District.

VI

Answering paragraph VI of the petition, the Commission admits and alleges that, pursuant to notice given, hearing in said Part VI was held at New York, N. Y., beginning June 27, 1932, and lasting until July 13, 1932, at which time evidence was presented by counsel for the Commission and by counsel for the complaining warehouses. Thereupon, in order to give the respondents ample time to present their [fol. 341] defense, the case was adjourned for approximately one month, which time was later extended for an additional week. Pursuant to notice given, said hearing was resumed in Washington, D. C., August 22, 1932, and continued through August 24, 1932, at which time evidence was presented by the respondents. At these hearings voluminous evidence was taken. The transcript of the testimony covers approximately 2,343 typewritten pages, and 234 documentary exhibits, many of which were voluminous, were received. Thereafter briefs were filed in said proceeding by various parties, including the Warehousemen's Protective Committee of New York, the Warehousemen's Association of the Port of New York, Cold Storage Warehousemen's Association of the Port of New York, New Jersey Mer-

chandise Warehousemen's Association, New York State Association of Refrigerated Warehouses, Marketmen's Association of the Port of New York, the Port of New York Authority, New York Dock Company, Bush Terminal Company, Beard's Erie Basin, American Dock Company, Pouch Terminal, Inc., Fidelity Warehouse Company, Republic Storage Company, Inc., New York Warehouse, Wharf & Terminal Association, Inc., The City of Boston and The Boston Port Authority.

March 13, 1933, an examiner's proposed report, of approximately 100 typewritten sheets, was issued and served upon the parties, to which exceptions were filed by the respondents and by certain other parties. Oral argument before the Commission was waived.

VII

Answering paragraph VII of the petition, the Commission admits that on December 12, 1933, it issued its report entitled Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y., published in 198 [fol. 342] I. C. C., 134-204, a printed copy of which is attached to the petition, following page 47, as Exhibit C. The Commission respectfully refers the Court to said report for full, accurate and complete information as to the Commission's discussion, statements and findings of fact and conclusions.

The Commission issued no order with said report but (page 202) admonished all carriers subject to the Act "that their practices and charges should be adjusted in conformity with the principles announced in this report."

VIII

Answering paragraph VIII of the petition, the Commission admits and alleges that respondents in said proceeding (plaintiffs here), although recognizing the existing evils as pointed out in the Commission's report of December 12, 1933, failed to comply with its findings as set forth therein. By order dated May 6, 1935, a true and correct copy of which is attached to the petition, pages 48-49, as Exhibit D, the Commission reopened the proceeding for further hearings for the purpose of bringing the record down to date.

IX

Answering paragraph IX of the petition, the Commission admits and alleges that on May 6, 1935, it also issued, concurrently with its order of the same date reopening said proceeding, a "Notice of Information to be sought at Reopened Hearings", a true and correct copy of which is attached to the petition, pages 50-53, as Exhibit E.

X

Answering paragraph X of the petition, the Commission admits and alleges that pursuant to notice given, further hearings were held at New York, N. Y., during the period from June 24 to July 6, 1935, and 1,629 additional pages of [fol. 343] testimony were taken, together with 68 additional documentary exhibits. Thereafter, further briefs were filed in said proceeding by the Warehousemen's Protective Committee of New York (representing complaining warehouses), New York Dock Company et al., and the Boston Port Authority. Oral argument before the Commission was again waived.

XI

Answering paragraph XI of the petition, the Commission admits and alleges that on June 8, 1936, the Commission issued its report on further hearing in said proceeding, published in 216 I. C. C., 291-357, a true and correct copy of which is attached to the petition, following page 54, as Exhibit F. The Commission denies that the summary of its findings as set forth in said paragraph XI of the petition is a correct and accurate statement of all of its findings in said report, and the Commission respectfully refers the Court to the report itself for full and accurate information in this regard.

XII

Answering paragraph XII of the petition, the Commission admits and alleges that with said report of June 8, 1936, and as part thereof, the Commission made and entered its order of the same date, a true and correct copy of which is attached to the petition, pages 55-58, as Exhibit G. (In this connection the Commission calls the Court's attention to the fact that said order of June 8, 1936, was superseded by its order of February 2, 1937, a copy of which is attached to the petition, pages 71-74, as Exhibit P.) On August 28, 1936, on

a petition of respondents dated August 26, 1936, the Commission postponed the effective date of said order of June 8, 1936, from October 1, 1936, to December 1, 1936.

[fol. 344]

XIII

Answering paragraph XIII of the petition, the Commission admits that on August 31, 1936, the respondents filed a petition for rehearing, reargument and reconsideration in said proceeding, a true and correct copy of which is attached to the petition, following page 59, as Exhibit H. The Commission also admits that similar petitions were filed by the Central Railroad Company of New Jersey, Lehigh Valley Railroad Company and New York Central Railroad Company, true and correct copies of which are attached to the petition as Exhibits I, J and K. Replies to said petitions were filed by various parties, including the Warehousemen's Protective Committee, the Boston Port Authority and the American Warehousemen's Association, Merchandise Division.

XIV

Answering paragraph XIV of the petition, the Commission admits the allegations thereof and further admits that Exhibit L, page 63 of the petition, is a correct copy of its order postponing the effective date of its order of June 8, 1936, to December 1, 1936.

XV

Answering paragraph XV of the petition, the Commission admits and alleges that by order dated October 12, 1936, it reopened the aforesaid proceeding for reargument and reconsideration and further postponed the effective date of the aforesaid order of June 8, 1936, to February 1, 1937, and set the proceeding for oral argument before it at its office in Washington, D. C., November 23, 1936. Exhibit M, page 64 of the petition, is a correct copy of said order.

[fol. 345]

XVI

Answering paragraph XVI of the petition, the Commission admits the allegations thereof and admits that Exhibit N, page 65 of the petition, is a correct copy of its order of December 23, 1936, further postponing the effective date of the above-mentioned order to April 1, 1937.

XVII

Answering paragraph XVII of the petition, the Commission admits and alleges that on November 23, 1936, it heard oral argument in said proceeding, Commissioners Mahaffie (Chairman, Meyer, Aitchison, Eastman, McManamy, Porter, Lee, Tate, Splawn and Caskie sitting. Thereafter, on February 2, 1937, the Commission issued its report on re-argument and reconsideration, published in 220-I. C. C. 102, a true and correct copy of which is set forth in Exhibit O, pages 66-70, of the petition. The Commission respectfully refers the Court to said report itself for full, accurate and complete information as to its contents. The Commission denies the allegation that it did not grant plaintiffs any opportunity to prove the prevailing market values of leases and services and in this connection calls the Court's attention to the fact that it granted two hearings in said proceedings and at said hearings plaintiffs had full and fair opportunity to make whatever relevant proof they desired to introduce.

XVIII

Answering paragraph XVIII of the petition, the Commission admits and alleges that with said report of February 2, 1937, and as part thereof, it issued its order dated February 2, 1937 (which superseded its order of June 8, 1936), a true and correct copy of which is reproduced in Exhibit P of the petition, pages 71-74. The Commission respectfully refers the Court to said order itself for full, [fol. 346] complete and accurate information as to its recitations and requirements. In this connection the Commission calls the Court's attention to its order of March 8, 1937, postponing the effective date of said order of February 2, 1937, from April 15 to June 15, 1937, a copy of which order is attached hereto marked Exhibit A.

XIX

Answering paragraph XIX of the petition, the Commission admits and alleges that in its aforesaid reports and findings, it found and concluded inter alia, that plaintiffs, and each of them, are guilty of giving unlawful concessions or rebates to certain shippers, and, by reason of such concessions, are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give

undue preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said Act, and depart from their published tariffs, in violation of section 6 of said Act. The Commission denies all the other allegations in said paragraph and denies that its aforesaid order of February 2, 1937, is either unlawful or void for the reasons set forth in said paragraph or for any other reason.

XX

Answering paragraph XX of the petition, the Commission admits that said paragraph correctly quotes one of the provisions of its order of February 2, 1937, but denies all the other allegations in said paragraph and denies that its said order is either unlawful or void as applied to plaintiff, the Central Railroad Company of New Jersey, for the reasons set forth in said paragraph, or for any other reason.

[fol. 347]

XXI

Answering paragraph XXI of the petition, the Commission denies that its said order of February 2, 1937, is either unlawful or void as applied to plaintiff, Lehigh Valley Railroad Company, for the reasons set forth in said paragraph, or for any other reason.

XXII

Answering paragraph XXII of the petition, the Commission denies that its order of February 2, 1937, is either unlawful or void as applied to plaintiff, The New York Central Railroad Company, for the reasons set forth in said paragraph, or for any other reason.

XXIII

Answering paragraph XXIII of the petition, the Commission denies that said order of February 2, 1937, will subject plaintiffs to either irreparable damage or injury or to any legal injury. The Commission admits that plaintiffs would be subject to a penalty of \$5,000 for knowingly failing or neglecting to obey the aforesaid order of February 2, 1937, and that in case of a continuing violation each day would be deemed a separate offense.

XXIV

Further answering paragraphs XVII to XXIII of the petition, the Commission alleges that in the aforesaid proceedings the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered by said reports and orders were submitted to the Commission for consideration, [fol. 348] including testimony and other evidence submitted on behalf of plaintiffs by counsel for said parties; that in briefs filed in said proceedings and in oral argument questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including questions raised by plaintiffs in this suit, and the Commission determined said matters and entered and served upon the plaintiffs and upon other interested parties its said reports and orders; that said reports and orders include the Commission's findings of fact, decisions, conclusions and requirements in the premises, and that upon the evidence aforesaid the Commission made the findings and stated the conclusions upon which said orders are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports it considered and weighed carefully each fact, circumstance and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of February 2, 1937, was not made or entered by it either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said petition.

The aforesaid reports and orders are hereby referred to and made a part hereof.

[fol. 349] All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Claude R. Porter. Jurat omitted in printing.

[fols. 350-351] EXHIBIT "A" TO ANSWER

Copy of Commission's order of March 8, 1937, postponing effective date of its order of February 2, 1937, from April 15 to June 15, 1937.

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 8th Day of March, A. D., 1937

Ex Parte No. 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part VI. Warehousing and Storage of Property By Carriers at Port of New York, N. Y.

Upon further consideration of the record in the above-entitled proceeding, and upon request of United States District Judge Murray Hulbert, Southern District of New York, and to meet the convenience of that Court:

It is ordered, That the effective date of the order in this proceeding entered under date of February 2, 1937, be, and it is hereby, postponed to June 15, 1937, and that said order shall in all other respects remain in full force and effect.

By the Commission.

(S.) George W. Laird, Acting Secretary. (Seal.)

[fol. 352] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION OF INTERVENTION—Filed April 10, 1937

Sirs:

Please Take Notice that upon the annexed petition of the American Warehousemen's Association, Merchandise Division, verified March 23, 1937, and upon all other papers filed and proceedings had in the above-captioned matter, the undersigned will move this Court at a Stated Term thereof for the hearing of motions to be held in Room 506 in the Federal Court House, Foley Square, Borough of Manhattan, New York City, on the 6th day of April, 1937, at 10:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order in substantially the form annexed to said petition, granting leave to said American Warehousemen's Association, Merchandise Division, to intervene in this proceeding and be made a party hereto, with right to appear by counsel and to answer the petition.

Dated, New York, March 31, 1937.

A. Lane Cricher, 907 Investment Building, Washington, D. C. Orrin G. Judd, One Wall Street, New York City. Solicitors for Petitioner.

To Edwin H. Burgess, Esq., 143 Liberty Street, New York City, Solicitor for Plaintiff. Elmer B. Collins, Esq., [fol. 353] Special Assistant to the Attorney General, Interstate Commerce Commission Building, Washington, D. C., Solicitor for Defendant, United States of America. J. Stanley Payne, Esq., Assistant Chief Counsel, Interstate Commerce Commission Building, Washington, D. C., Solicitor for Interstate Commerce Commission, Intervenor.

[fol. 354] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF THE AMERICAN WAREHOUSEMEN'S ASSOCIATION,
 MERCHANDISE DIVISION, FOR LEAVE TO INTERVENE—Filed
 April 10, 1937

The petition of the American Warehousemen's Association, Merchandise Division, respectfully shows:

I. That petitioner is an unincorporated association which for forty-six years has been functioning continuously as the national business organization for the public warehousing industry; its principle office is at 222 West Adams Street, Chicago, in the State of Illinois. The Association was organized for the purpose of promoting the interests of warehousemen, elevating the standard of the business, encouraging an enlarged and friendly intercourse among its members, and generally to advance the welfare of the warehousing business and all matters relating thereto. Its members comprise warehousemen engaged in the merchandise warehousing industry, which activity includes the receiving, handling, storing and shipping of goods, and other related services in connection with the warehousing of merchandise; many of its members representing a substantial portion of the space devoted to the merchandise warehousing business throughout the United States are located within the Port of New York. In the accomplishment of its purposes, petitioner from time to time participates on behalf of its members in proceedings relating to matters of transportation in connection with the handling, storing and warehousing of commodities, pending before the Interstate Commerce Commission, and other governmental agencies, and the courts.

II. The suit having the caption above stated is a suit instituted under Acts of Congress, approved June 10, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1149), and October 22, 1913 (38 Stat. 219), and more particularly, under the provisions of the Code of Laws of the United States, Title 28, Section 41 (28), 43-48, both inclusive, in which the plaintiffs seek to have this court enjoin, set aside, cancel or suspend, in whole or in part, a certain order made and entered by the Interstate Commerce Commission in the proceedings

entitled "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y."

III. The decision and order of the Interstate Commerce Commission, above referred to, were made on the 2nd day of February A. D. 1937, and relate to the warehousing practices of respondents (plaintiffs here) with respect to the storage and handling of property by carriers at the Port of New York, New York, and are of concern to petitioner and its members; they are directly concerned with and adversely affected by the warehousing practices investigated by the Interstate Commerce Commission in said proceeding, and are deeply concerned with the matters and things included in said report and order of said Commission. Your petitioner, therefore, has an interest on behalf of its members, in the subject-matter of this suit.

IV. Your petitioner, on behalf of itself and its members, [Vol. 356] was a party in interest to and participated in the proceeding before the Interstate Commerce Commission in the aforesaid Docket "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y."

V. Section 45a of the Judicial Code provides in part as follows:

"... That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, and otherwise, as to subserve the ends of justice and speed the determination of such suits; Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of

panies being members of the Warehousemen's Protective Committee, are dependent on the plaintiffs for essential transportation service in the interstate transportation of goods and merchandise to and from their warehouses.

(b) These 50 warehouse companies have been, and will be, competitors² of the preferred warehouse companies named in paragraph III above and competitors of the plaintiffs who are also engaged in the warehousing business, and said 50 warehouse companies have been and will be subjected to unjust discrimination and undue prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act, with resulting injury and damage, continuing at all times [fol. 330] that said order of the Commission is postponed, annulled or restrained.

VI. Petitioner, The Warehousemen's Protective Committee, having a statutory right of action by authority of the provisions of Section 13 (1) of the Interstate Commerce Act, was a party in interest to said proceeding before the said Commission in that, as an intervener, it appeared and submitted evidence therein and took an active part in all phases of that proceeding and, therefore, as the representative of said 50 Warehouse companies, it has a statutory right by virtue of the provisions of Section 45a of the Judicial Code to intervene and be heard in the case at bar.

VII. Your petitioner desires to intervene and to appear as a party defendant in said suit, in opposition to the prayer of the plaintiffs' petition, for the purpose of being heard and protecting its rights and the rights of its members.

Wherefore your petitioner prays that an order may be passed by this Honorable Court permitting your petitioner to intervene as party defendant in the above-entitled proceeding.

The Warehousemen's Protective Committee, by John J. Hickey, Solicitor for Petitioner, 835 Southern Building, Washington, D. C.

² Comprehensive findings of the competition were made on several pages of the Commission's said reports, including the following pages thereof: 198 I. C. C. 189-192; 216 I. C. C. 294, 303, 311, 319, 324, 329, 332, 337, 355.

Of Counsel: William J. Donovan, Donovan, Leisure, New-
ton & Lombard, 2 Wall Street, New York, N. Y.

[fols. 331-333] *Duly sworn to by T. A. Adams. Jurat
omitted in printing.*

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE WAREHOUSEMEN'S PROTECTIVE COMMITTEE,
INTERVENER—Filed April 8, 1937

The Warehousemen's Protective Committee, intervener
in the above entitled suit, answering the petition herein:

I. Admits the allegations contained in paragraphs num-
bered I to XVIII, both inclusive, thereof, except that inter-
vener does not admit (a) the allocation of the findings of the
Interstate Commerce Commission to each one of the sev-
eral respondent carriers as averred in paragraph num-
bered XI of plaintiff's petition, and (b) that the Interstate
Commerce Commission did not afford plaintiffs ample op-
portunity to offer evidence in their behalf as averred in
paragraph numbered XVII of plaintiff's petition.

II. Denies the allegations contained in paragraphs num-
bered XIX to XXIII, both inclusive, thereof.

Wherefore, having fully answered the petition, intervener
prays that the prayer of plaintiffs be denied and that their
petition be dismissed at the cost of the plaintiffs.

The Warehousemen's Protective Committee, by John
J. Hickey, Solicitor for Intervener, 835 Southern
Building, Washington, D. C.

Of Counsel: William J. Donovan, Donovan, Leisure, New-
ton & Lombard, 2 Wall Street, New York, N. Y.

[fols. 335-336] *Duly sworn to by T. A. Adams. Jurat
omitted in printing.*

the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein."

VI. Your petitioner desires to intervene and to appear as a party in said suit in opposition to the prayer of the plaintiffs' petition and to be represented by counsel therein.

Wherefore, your petitioner prays that an order may be entered allowing your petitioner to intervene and making your petitioner a party to said suit in accordance with the provisions of the Judicial Code above recited, with leave to answer the plaintiffs' petition therein, and for such other and further relief in the premises as may be just, and your [fol. 357] petition will ever pray, etc.

A. Lane Cricher, Counsel for Petitioner, 907 Investment Bldg., Washington, D. C. Orrin G. Judd, 1 Wall Street, New York, N. Y., designated as Resident Counsel under Rule V of the Rules of This court.

[fols. 358-360] *Duly sworn to by Wilson V. Little. Jurat omitted in printing.*

[fol. 361] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—Filed April 13, 1937

This cause came on to be heard upon the petition of American Warehousemen's Association, Merchandise Division, verified March 23, 1937, for leave to intervene herein, and for an order making it a party to this suit; and no one appearing in opposition, it is

Ordered and Decreed that the motion for leave to intervene be, and the same hereby is, granted and said petitioner has leave to intervene in this suit and is hereby made a

party hereto of its own motion as of right, with right to appear by counsel and to answer the petition.

Dated April 12/37.

Vincent L. Leibell, United States District Judge.

Consented to: Elmer B. Collins, Special Ass't to Attorney General for Defendant, United States of America.

[fol. 362] Sme:

Please take notice that an order of which the within is a copy was duly filed and entered in the office of the Clerk of The United States District Court, Southern District of New York.

On the 13th day of April, 1937.

Dated New York, April 13, 1937.

Yours, &c., Davies Auerbach & Cornell, No. One Wall Street, Borough of Manhattan, City of New York.

To Edwin H. Burgess, Esq., 143 Liberty St., Attorney for Baltimore & Ohio R. R. Company, and A. Lane Cricher, 907 Investment Building, Washington, D. C., Solicitors for Petitioner.

[fols. 363-364] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF AMERICAN WAREHOUSEMEN'S ASSOCIATION, MERCHANDISE DIVISION—Filed April 10, 1937

Now comes the American Warehousemen's Association, Merchandise Division, one of the Intervening Defendants in the above entitled suit, and for answer to the petition herein adopts the answer of the Interstate Commerce Commission in the above entitled suit as its own, and repeats with the same force and effect as though fully set forth herein at length, the denials, admissions and allegations contained in said answer.

Wherefore, having fully answered this Intervening Defendant prays that the petition herein be dismissed.

A. Lane Cricher, 907 Investment Building, Washington, D. C.; Orrin G. Judd, One Wall Street, New York City, Solicitors for American Warehousemen's Association, Merchandise Division.

[fol. 365] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF ORDER—Filed April 16, 1937.

SIRS:

Please take notice that annexed hereto is a copy of an order in the above entitled suit, duly entered in the office of the Clerk of the U. S. District Court, for the Southern District of New York, Federal Court Building, New York City, N. Y. on the 15th day of April, 1937.

Dated, New York, April 15, 1937.

Yours, etc., E. H. Burgess, Solicitor for Plaintiffs,
143 Liberty Street, New York, N. Y.

To J. Stanley Payne, Esq., Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C., Elmer B. Collins, Esq., Special Assistant to the Attorney General of the United States, Washington, D. C., John J. Hickey, Esq., Solicitor for The Warehousemen's Protective Committee, 835 Southern Building, Washington, D. C., Donovan, Leisure, Newton & Lombard, Esqrs., 2 Wall Street, New York, N. Y., A. Lane Cricher, Esq., 907 Investment Building, Washington, D. C., Orrin G. Judd, Esq., 1 Wall Street, New York City, N. Y.

[fol. 366] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CASE FOR HEARING—Filed April 16, 1937

Whereas, on the 10th day of March, 1937, plaintiffs filed their petition in the above entitled suit, seeking to have enjoined, suspended, annulled and set aside a certain order of the Interstate Commerce Commission entered on February 2, 1937, in its certain proceeding referred to as Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part 6, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y., described in said petition, and praying for an interlocutory injunction suspending and restraining the enforce-

ment, operation and execution of and setting aside said order; and further praying that the undersigned call to his assistance in the hearing and determination of this cause two other judges, of whom one shall be a Circuit Judge; and

Whereas, by order dated March 12, 1937, The Honorable Harrie B. Chase, United States Circuit Judge, Second Circuit, and The Honorable Robert P. Patterson, United States District Judge for the Southern District of New York, were [fols. 367-368] called to the assistance of the undersigned to hear and determine the petition of the plaintiffs herein on a day thereafter to be fixed;

It is Ordered, that the said petition be, and it is hereby, set for hearing before The Honorable Harrie B. Chase and The Honorable Robert P. Patterson and the undersigned on the 22nd day of April, 1937, at the United States Court House, Room 506, in the Borough of Manhattan, City and State of New York, at two o'clock in the afternoon, or soon thereafter as counsel can be heard.

Hulbert, United States District Judge.

Dated at New York, N. Y., this 15th day of April, 1937.

[fol. 369] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF THE BOSTON PORT AUTHORITY FOR LEAVE TO INTERVENE—Filed April 20, 1937

Now comes your petitioner, the Boston Port Authority, and respectfully represents to this Honorable Court as follows:

1. Your petitioner is a public board duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and is established for the purpose, among others, of maintaining and developing the business of the Port of Boston and of promoting a free flow of commerce to and through said port.

2. The above entitled proceeding is a suit instituted under Acts of Congress approved on June 18, 1910 (36 Stat. 539) March 3, 1911 (36 Stat. 1149) and October 22, 1913 (38 Stat. 219); Code of Laws of the United States,

Title 28, Sections 41(28) and 43-48 inclusive, by which suit the plaintiffs seek to have this Court find to be null and void, set aside, suspend and annul, and to enjoin the enforcement of, a certain order made and entered by the Interstate Commerce Commission on February 2, 1937, in the proceeding entitled on the docket of said Commission *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y.*

3. The order of the Interstate Commerce Commission, [fol. 370] hereinbefore in paragraph 2 hereof referred to, relates to certain warehousing, storage, handling and insurance practices of certain common carriers by railroad, subject to the provisions of the Interstate Commerce Act, at the Port of New York, New York, and to rates and charges imposed by said carriers for warehousing, storage, handling in and out of storage and insurance at said Port. Said order directs said carriers to cease and desist from such practices, rates and charges as are found, in certain reports incorporated by reference into said order, to be unlawful and in violation of Sections 2, 3 and 6 (7) of the Interstate Commerce Act.

4. The Port of Boston is competitive with the Port of New York and said practices engaged in at said Port of New York and said rates and charges so found to be unlawful have an adverse effect upon and deter the movement of traffic through and injure the business of the Port of Boston.

5. Your petitioner was interested in, and, by virtue of the provisions of Section 13 (1) of the Interstate Commerce Act, participated, as an intervener, in, the proceedings before the Interstate Commerce Commission hereinbefore in paragraph 2 hereof referred to. Your petitioner represents a community and is an association interested in the order hereinbefore in paragraph 2 hereof referred to, and in the above entitled proceeding, and by virtue of the provisions of Section 212 of the Judicial Code (36 Stat. 1150 U. S. C. Title 28, Section 45a) is entitled to intervene in the above entitled proceeding.

6. Your petitioner desires to intervene and to appear as a party defendant in said suit for the purpose of being heard and of protecting its interests and the interests of the community it serves.

Wherefore your petitioner prays that an order may be entered herein allowing your petitioner to intervene as a party defendant in the above-entitled proceedings and for such other and further relief in the premises as may be just and proper.

The Boston Port Authority, by (Sgd.) Henry E. Foley, Solicitor for Petitioner, 11 Beacon Street, Boston, Mass. (Sgd.) Searle, James & Tyng, of Counsel.

[fols. 371-372] *Duly sworn to by Richard Parkhurst.
Jurat omitted in printing.*

[fol. 373] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—Filed April 21, 1937

This cause came on to be heard upon the petition of the Boston Port Authority for leave to intervene as a party defendant and thereupon, upon consideration thereof,

It is hereby ordered that:

The petition of the Boston Port Authority for leave to intervene be, and the same hereby is, granted and said petitioner has leave to intervene in the above-entitled proceeding at a party defendant.

Dated 4/20/37.

(Sgd.) Robert P. Patterson, U. S. D. J.

The making and entry of the above order is hereby consented to.

(Sgd.) Edwin H. Burgess, Solicitors for Plaintiff.

(Sgd.) Lamar Hardy, Solicitors for Defendant.

J. W. K.

[fol. 374] SIR:

Please Take Notice that an order of which the within is a copy was duly entered herein and filed with the Clerk of the United States District Court for the Southern District of New York on the 20th day of April, 1937.

Dated, New York, April 21, 1937.

Yours, etc., Searle, James & Tyng, Solicitors for Defendant, Boston Port Authority, Office & P. O. Address: 20 Exchange Place, Borough of Manhattan, New York City.

To Edwin H. Burgess, Esq., Solicitor for Plaintiffs;
Lamar Hardy, Esq., United States Attorney for the South-
ern District of New York, Solicitor for Defendant, United
States of America.

[fol. 375] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE BOSTON PORT AUTHORITY, INTERVENOR—
Filed April 20, 1937

Now comes the Boston Port Authority, intervenor
herein, and answering the petition herein:

I. Intervener admits the allegations contained in paragraphs numbered I to XVIII of said petition, both inclusive, except that intervenor does not admit but denies (a) that the summary statement of the findings of the Commission contained in paragraphs numbered XI and XIX of said petition is an adequate and correct summary of the findings referred to and (b) that the Interstate Commerce Commission did not afford plaintiffs ample opportunity to offer evidence in their behalf as averred in paragraph numbered XVII of plaintiff's petition.

II. Intervener denies the allegations contained in paragraphs numbered XIX to XXIII, both inclusive, thereof.

Wherefore, having fully answered the petition, intervenor prays that the prayer of plaintiffs be denied and that their petition be dismissed at the cost of the plaintiffs.

The Boston Port Authority, by (Sgd.) Henry E. Foley, Solicitor for Intervener, 11 Beacon Street, Boston, Mass. (Sgd.) Searle, James & Tyng, of Counsel, 20 Exchange Place, New York City.

[fols. 376-377] *Duly sworn to by Richard Parkhurst.
Jurat omitted in printing.*

[fol. 378] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF CITY OF BOSTON FOR LEAVE TO INTERVENE—Filed
April 20, 1937

Now comes your petitioner, the City of Boston, and respectfully represents to this Honorable Court as follows:

1. Your petitioner is a municipal corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts,

2. The above entitled proceeding is a suit instituted under Acts of Congress approved on June 18, 1910 (36 Stat. 539) March 3, 1911 (36 Stat. 1149) and October 22, 1913 (38 Stat. 219) Code of Laws of the United States, Title 28, Section 41 (28) and 43-48, by which suit the plaintiffs seek to have this Court find to be null and void, set aside, suspend and annul, and to enjoin the enforcement of, a certain order made and entered by the Interstate Commerce Commission on February 2, 1937, in the proceeding entitled on the docket of said Commission Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y.

3. The order of the Interstate Commerce Commission, hereinbefore in paragraph 2 hereof referred to, relates to certain warehousing, storage, handling and insurance practices of certain common carriers by railroad, subject to the provisions of the Interstate Commerce Act, at the Port of New York, New York, and to rates and charges imposed by [fol. 379] said carriers for warehousing, storage, handling in and out of storage and insurance at said Port. Said order directs said carriers to cease and desist from such practices, rates and charges as are found, in certain reports incorporated by reference into said order, to be unlawful and in violation of Sections 2, 3 and 6 (7) of the Interstate Commerce Act.

4. The Port of Boston is competitive with the Port of New York and said practices engaged in at said Port of New York and said rates and charges so found to be unlaw-

ful have an adverse effect upon and deter the movement of traffic through and injure the business of the Port and City of Boston.

5. Your petitioner was interested in, and, by virtue of the provisions of Section 13(1) of the Interstate Commerce Act, participated, as an intervener, in, the proceedings before the Interstate Commerce Commission hereinbefore in paragraph 2 hereof referred to. Your petitioner is a community interested in the order hereinbefore in paragraph 2 hereof referred to, and in the above entitled proceeding, and by virtue of the provisions of Section 212 of the Judicial Code, 36 Stat. 1150 U. S. C. Title 28, Section 45a, is entitled to intervene in the above entitled proceeding.

6. Your petitioner desires to intervene and to appear as a party defendant in said suit for the purpose of being heard and of protecting its interests and the interests of the community it serves.

Wherefore your petitioner prays that an order may be entered herein allowing your petitioner to intervene as a party defendant in the above-entitled proceedings and for such other and further relief in the premises as may be just and proper.

City of Boston, by (Sgd.) Henry E. Foley, Solicitor for and Corporation Counsel of Petitioner, 11 Beacon Street, Boston, Mass. (Sgd.) Searle, James & Tyng, of Counsel.

[fol. 380-381] *Duly sworn to by Frederick W. Mansfield.
Jurat omitted in printing.*

[fol. 382] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—Filed April 21, 1937

This cause came on to be heard upon the petition of the City of Boston for leave to intervene as a party defendant and thereupon, upon consideration thereof,

It is Hereby Ordered That:

The petition of City of Boston for Leave to intervene be, and the same hereby is, granted and said petitioner has

leave to intervene in the above-entitled proceeding as party.

Dated 4/20/37.

(Sgd.) Robert P. Patterson, U. S. D. J.

The making and entry of the above order is hereby consented to.

(Sgd.) Edwin H. Burgess, Solicitors for Plaintiff.

(Sgd.) Lamar Hardy, Solicitors for Defendant.
J. W. K.

[fol. 383] Sir:

Please Take Notice that an order of which the within is a copy was duly entered herein and filed with the Clerk of the United States District Court for the Southern District of New York on the 20th day of April, 1937.

Dated, New York, April 21, 1937.

Yours, etc., Searle, James & Tyng, Solicitors for Defendant, City of Boston, Office & P. O. Address:
20 Exchange Place, Borough of Manhattan, New York City.

To Edwin H. Burgess, Esq., Solicitor for Plaintiffs;
Lamar Hardy, Esq., United States Attorney for the Southern District of New York Solicitor for Defendant, United States of America.

[fol. 384] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF CITY OF BOSTON, INTERVENER—Filed April 20,
1937

Now comes City of Boston, intervener herein, and answering the petition herein:

1. Intervener admits the allegations contained in paragraphs numbered I to XVIII of said petition, both inclusive, except that intervener does not admit but denies (a) that the summary statement of the findings of the Commission contained in paragraphs numbered XI and XIX of said petition is an adequate and correct summary of the findings referred to, and (b) that the Interstate Commerce Commission did not afford plaintiffs ample opportunity to

offer evidence in their behalf as averred in paragraph numbered XVII of plaintiff's petition.

2. Intervener denies the allegations contained in paragraphs numbered XIX to XXIII, both inclusive, thereof.

Wherefore, having fully answered the petition, intervenor prays that the prayer of plaintiffs be denied and that their petition be dismissed at the cost of the plaintiffs,

City of Boston, by (Sgd.) Henry E. Foley, Solicitor for and Corporation Counsel of Intervener, 11 Beacon Street, Boston, Mass. (Sgd.) Searle, James & Tyng, Of Counsel, 20 Exchange Place, New York City.

[fols. 385-386] *Duly sworn to by Frederick W. Mansfield. Jurat omitted in printing.*

[fol. 387] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

THE BALTIMORE & OHIO RAILROAD COMPANY et al., Plaintiffs,
against

THE UNITED STATES OF AMERICA, Defendant, and INTERSTATE
COMMERCE COMMISSION et al., Intervening-Defendants

Before Chase, Circuit Judge, and Patterson and Hulbert,
District Judges

In Equity. Petition by seven railroad companies engaged in interstate commerce to enjoin and set aside an order of the Interstate Commerce Commission.

Thomas P. Healy, Carleton W. Meyer, Solicitors for above-named plaintiff.

Alex H. Elder, Richard J. Laly, Counsel for the Central Railroad Co.

A. Lane Cricher, Counsel for American Ware-Housemen's Ass'n, Merchandise Div.

Orrin G. Judd, of Counsel.

Henry E. Foley, Solicitors for Interveners; Searles, James & Tyng, of Counsel.

John J. Hickey, Solicitor for Intervener, Warehousemen's Protective Committee.

[fol. 388] Edwin H. Burgess, Solicitor for Plaintiffs;
Charles R. Webber, Walter J. Larrabee, M. B. Pierce,
Guernsey Orcutt, of Counsel.

Elmer B. Collins, Special Assistant to the Attorney General.

J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission.

Robert H. Jackson, Assistant Attorney General.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission.

OPINION—Filed August 25, 1937

CHASE, Circuit Judge:

This suit was brought by seven common carriers in interstate commerce under the provisions of the Urgent Deficiencies Act and heard by a court of three judges constituted as the law requires. (38 Stat. 219; 28 U. S. C. A. Secs. 41 (28) and 43-48, inc.).

The plaintiffs are The Baltimore and Ohio Railroad Company; The Central Railroad of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; The New York Central Railroad Company; and The Pennsylvania Railroad Company. All of them transport freight by rail to, and from the Port of New York District in interstate or foreign commerce or both. They all provide warehouse space and services for such freight both of the kind shown as in-transit and that classed as commercial; the latter kind being what is not essential to actual transportation of the goods. The plaintiffs are competitors among themselves for both the eastbound and westbound New York traffic and also with private corporations owning and operating warehouses in the New York District for that part of the business which is done by warehousemen.

[fol. 389] The Interstate Commerce Commission undertook, on July 6, 1931, an investigation on its own motion in a proceeding entitled, Practices of Carriers Affecting Operating Revenues and Expenses, in which all common carriers by rail-subject to the Interstate Commerce Act were made parties, to determine whether those carriers were being operated economically and efficiently within the provisions of Sec. 12 and 15 (a) of the Act. Thereafter, its

attention was especially directed by complaints of warehousemen in the Port of New York District to the warehouse practices of the plaintiffs in that district and on January 6, 1932 it began an investigation, known as Ex Parte 104, in connection with its general proceeding above mentioned for the purpose of " . . . establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, . . . "

The object of this suit is to enjoin and set aside an order entered on February 2, 1937 by the Interstate Commerce Commission in subdivision Ex Parte 104 of the original proceeding requiring the plaintiffs to cease and desist before a future date fixed (and later extended so that it has not as yet become effective) from certain practices of which we are concerned only with that part which prohibits all the plaintiffs (except the Central Railroad of New Jersey as to furnishing insurance) from permitting shippers in interstate commerce over their lines from using space by lease or otherwise in warehouses, buildings or piers of the plaintiffs at rates and charges which do not compensate the plaintiffs for the cost of providing such space; from storing [Vol. 390] goods shipped over their lines in interstate commerce or providing commercial storage for shipping at less than cost; from directly or indirectly handling goods for shippers at such warehouses, buildings or piers at rates and charges which fail to compensate them for the cost of such handling; from insuring such goods for shippers at less than cost; and from " . . . applying, by means of tariffs now on file with this Commission . . . non-compensatory rates and charges . . . for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service". The Central Railroad of New Jersey also seeks to enjoin and set aside that part of the order prohibiting it from "subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said . . . carrier".

Before the order was made, the Interstate Commerce Commission had conducted hearings at length at which all parties were given the opportunity to present evidence and

be heard. The Warehousemen's Protective Committee, an organization representing the independent warehouses in the District was allowed to intervene and take part. The City of Boston; the Boston Port Authority; and the American Warehousemen's Association, Merchandise Division, have become intervenors in this suit. The Commission filed [fol. 391] its first report on December 12, 1933 wherein it admonished the plaintiffs to change the practices it disapproved but made no order. On June 8, 1936 it filed a second report; and on February 2, 1937 a third report, which reaffirmed the others in so far as is now important, and made the order herein resisted. The order attacked is, accordingly, based upon the findings in all three reports.

In view of the restricted nature of the issues presented, it will not be necessary to state at length the substance of these reports to which reference, however, is made. It is sufficient presently to know that upon adequate evidence the Commission has found that the plaintiffs now do at least cost all those things which the order prohibits them from doing at non-compensatory rates and charges. There is no finding that they do not conform to their published tariffs in so far as such tariffs cover the services provided but the indirect violation of Sec. 6 of the Interstate Commerce Act by the forbidden practices has been found in that those permitted to receive such below cost-services in effect move their goods at less than tariff rates and receive preferential treatment in violation of Sect. 3. While others not so favored are discriminated against in violation of Sec.

2

The common complaint of all the plaintiffs is that the order was made after the denial of their motion to reopen the proceedings for the purpose of introducing evidence to show that the condemned services were provided at charges equivalent to their fair and reasonable value; that there are no findings sufficient to support it in that the Commission did not find that what the plaintiffs provided for [fol. 392] shippers at less than cost was provided at less than the fair and reasonable value; and that cost is too vague and indefinite a term to make the order sufficiently definite to enable them to comply.

All this boils down to the one issue of whether or not the findings are sufficient support in law for the order made.

If they are the plaintiffs were not prejudiced by the denial of their motion to reopen the proceedings. It is clear that the order must be based upon findings, supported by the evidence, which show it to be within the jurisdiction of the Commission as derived from the Act. *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499. The power to make the order, therefore, depends upon whether the providing of such services as were found to have been furnished for less than cost violates the Act in that some shippers are given more favorable treatment than others in like situation. It is not denied that that result would follow if such services were performed for some shippers only at less than their reasonable worth but it is insisted that reasonable worth and not cost is the true criterion by which their practices must be tested in the light of the provisions of the Act.

The argument, further developed in discussing later the special complaint of the Central Railroad of New Jersey, is that the plaintiffs have invested in warehouse facilities in the New York district at prices so high that they cannot successfully compete with warehousemen in that territory if they charge enough to return to them the cost of the service since their overhead is necessarily so high. That, of [fol. 393] course, depends upon what treatment should be accorded excessive investment under accepted accounting standards in figuring cost. We are not now called upon to go into that subject. Moreover, we find no real substance to the argument that cost is too vague a term upon which to base the order. Cost is certainly as definite as the fair value standard for which the plaintiffs contend and since it can be figured from past actual experience would seem to be much more so. Indeed, it is idle to argue that cost does not admit of such definite calculation that the plaintiffs cannot comply with the order.

In any event we think the cost basis has been approved by authority which binds us. In *New York, N. H. & H. R. Co. v. Interstate Com. Commission*, 200 U. S. 351; 50 L. Ed. 515 the sale and transportation of coal at less than the cost of the coal plus transportation at tariff rates was held to violate Secs. 2, 3 and 6 of the Interstate Commerce Act. In giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, we can

find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both at rates less than those of the published tariff plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation. In the present instance commercial warehousing, storage and insurance were sold instead of coal, a circumstance [fol. 394] creating no difference so far as the principle which controls is concerned.

Though it is true that the published tariffs of the plaintiffs cover what is called in-transit storage and such tariff rates have been charged uniformly, it by no means follows that Sec. 2 and 3 have not been violated by the practices forbidden by the order. In its second report the Commission said: "The transit privilege permits the stopping of goods at an intermediate point between the point of shipment and final destination, and the reshipment from the intermediate point at the through freight rate lower than the combination of local rates which the shipper would otherwise pay. The privilege is of great importance to many shippers and its commercial necessity has long been recognized. We are not to be understood as condemning bona fide transit arrangements, but only the practice here considered in which the carriers, through stress of competition, have assumed by tariff publication a part of the cost of strictly commercial storage and handling of goods.

* * *. And in its third report the Commission said in reference to this subject; "What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise [fol. 395] of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them and thereby violate sections 2, 3 and 6 of the act".

The violations of the Act which were amply proved and which the Commission pointed out broadly as the above

quotations show are based upon the voluntary performance by the carriers for some shippers only, in order to get or keep business, of commercial services in connection with transportation services at rates and charges which when added together do not return to the carriers the published tariff rates plus the cost of the commercial services. As to what are commercial services, see *Merchants Warehouse Co. v. United States*, 283 U. S. 303. To the extent that such cost is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carrier's loss had been paid. And this is so whether the voluntary commercial services performed by the carriers to get or hold business in the face of competition are charged at their fair value or not. If the carriers sustain losses in performing voluntary commercial services for shippers as an inducement to them to buy transportation of the carriers at the published tariff rates for the goods as to which such voluntary commercial services are performed, it can make no difference, in the effect of such practices on the tariff rates, that the voluntary commercial services were charged at their fair value [fol. 396] if that happens for whatever reason to be less than the cost to the carriers. To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the Act makes applicable alike to all shippers under like circumstances and if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the evidence and has been found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not. That is the vice the order is designed to do away with and it will not be cured if the fair value standard is substituted for the cost standard in respect to commercial services performed to get or hold transportation business. If the cost to the carriers of the inducing commercial services per-

formed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the Act allow as surely whether the commercial services are charged at their fair value or not. In other words, fair value is immaterial except on the question of efficiency in connection with the determination of loss. So we agree with the Commission [fol. 397] that the condemned practices do violate the Act and hold the order supported by the findings and generally within the scope of the Commission's power.

The New York Central Railroad Company was found to have leased space in its warehouses to the Mellish Company and the Auto Storage Company at less than cost for the storage of automobiles. These lessees were found to be shippers in interstate commerce over the New York Central's lines; to be competitors of warehouse companies in the New York District who were also shippers in interstate commerce over that railroad; and that the railroad paid allowances to those lessees for unloading and handling automobiles which were commercial services. The railroad has especially attacked these findings. In view of what was said as to commercial services and shippers within the meaning of the Act in *Warehouse Co. v. United States*, supra, we think the findings were justified by the evidence.

The Central Railroad Company of New Jersey, through a wholly owned subsidiary called the Newark Warehouse Company, built a large warehouse in Newark, N. J. in 1905. The railroad rented part of the building from its subsidiary for station space from 1906 to 1932 and the subsidiary operated the remainder as a warehouse until 1934 by which time it had accumulated a large deficit that had been increased by the termination of the railroad of its lease for station space in 1932. The building, after unsuccessful attempts had been made to sell it, was leased on June 1, 1934 to the Newark Central Warehouse Company, not connected with the railroad or its subsidiaries, at a varying annual rental, based in part upon the earnings of the lessee, with the privilege of renewal after two years. The rental received during the first year was a little less than half the taxes on the building for that year and it is clear that the Commission's finding that the lease is non-compensatory is correct. The Newark Central Warehouse Company, as justifiably found by the Commission, "engages in a general warehouse business and performs any

and all services necessary in conducting that business. In many instances it has dominion for transportation purposes as consignee or consignor : . . . over goods shipped in interstate commerce and stored by it. It engages in whatever branch of the general warehousing business it considers profitable, including the handling of cars containing shipments for two or more consignees and occasionally handles the equivalent of pool cars. In some cases the warehouse company pays the freight charges to the railroad and later collects from the owners of the goods. This lessee is a shipper in interstate commerce over the railroad lines in competition with other such shippers and to the extent that it is allowed to use the railroad's warehouse (we treat the building as owned by the railroad as have the parties though the title is in a wholly owned subsidiary) at the expense of the road for commercial purposes in connection with the transportation services it buys of the road the published tariff rates of the railroad are in effect cut to it. This would be plain enough if the railroad let the Central Company so use the warehouse for nothing and an inadequate rental which has the effect of cutting the published tariff rates to the favored lessee [fol. 399] shipper is a violation of Secs. 2, 3 and 6 of the Interstate Commerce Act. *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292. The prohibition of the order is the leasing at a non-compensatory rental of space which subsidizes and grants concessions to the lessee. The Commission drew the conclusion in its second report from sustaining evidence, " . . . that the warehouse is an adjunct of the railroad's traffic department, (and) that the latter has made continuous and intensive efforts to solicit traffic over its line for storage in the warehouse". That it had an incentive to do that not only to increase its traffic but also to increase its net rent under the terms of the lease is plain enough. It is no answer to the violations of the statute to say that as the railroad has a losing piece of property on its hands which it acquired in good faith it should be permitted to rent it for its fair rental value. That is true only provided so doing does not violate the law. While it may lawfully minimize its losses from bad investments it may not give concessions to a favored shipper which in effect permit the railroad to cut its published tariff rates to that shipper. In this respect all carriers subject to the provisions of the Interstate Commerce Act must

stand and be treated alike whether they have made poor investments or not.

In what we have said we have reference, as did the Commission, to the necessity for rates and charges and rentals for commercial services which will not reduce in effect the published tariff rates for transportation services including [fol. 400] such in-transit handling and storage as are properly included in such published tariffs. As such below-cost commercial services are distinguishable from what are properly transportation services we do not come into conflict with the principle that reasonable tariff rates need not be sufficient to give railroads a fair return on every transportation service rendered in respect to every part of its property so used. See, *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649; *Atlantic C. L. R. Co. v. North Carolina Corp.* Com. 206 U. S. 1.

We, therefore, are of the opinion that the findings of the Commission supported by the evidence show that it had the power to make the order in so far as it concerns every plaintiff and that the order is sufficiently certain and definite in terms to enable the plaintiffs to comply.

Bill dismissed with costs.

Concur.

Robert P. Patterson, U. S. D. J.

[fol. 401] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONCURRING OPINION—Filed August 25, 1937

HULBERT, D. J., concurring:

With some misgiving, I concur in the opinion of Circuit Court Judge Chase whose conclusions are inescapable under the law as it now is.

The voluntary inquiry instituted by the Interstate Commerce Commission. "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues and Expenses" was upheld, generally, by the Supreme Court of the United States in the case of *United States of America and Interstate Commerce Commission, appellants, vs. American Sheet and Tin Plate Co., et al.*, No. 734, October Term 1936, and

particularly with reference to Part 2 of that proceeding having to do with terminal services.

The plaintiffs in the case now before this Court have published tariffs including the in-transit storage as well as the rates of carriage. The Interstate Commerce Commission has found that under the published tariff rates the [fol. 402] storage charges at less than cost is a discrimination.

Under the doctrine enunciated in *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, I agree there is no practical distinction between service charges on the basis of cost and reasonable or fair value, but I am apprehensive that the effect thereof will be to substitute the uncertainty of rates in reliance upon business competition for the certainty of published tariff rates and as a practical result the cost to shippers, and incidentally to the public, may, and probably will, increase, since the warehousemen are not subject to any regulatory authority whatsoever.

(Sgd.) Hulbert, U. S. D. J.

Dated, N. Y., Aug. 24, 1937.

[fol. 403] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION OF PLAINTIFFS FOR STAY PENDING APPEAL

To the Honorable Harrie B. Chase, Circuit Judge, Robert P. Patterson, District Judge, George Murray Hulbert, District Judge:

Now come The Baltimore and Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; The New York Central Railroad Company, and The Pennsylvania Railroad Company, plaintiffs in the above entitled suit, and respectfully move the Court to enter an order herein, staying and suspending the order of the Interstate Commerce Commission, dated February 2, 1937, as amended by order dated September 23, 1937, in the matter of Ex

Parts 104, Practices of Carriers Affecting Operating Revenues or Expenses; Part VI, Warehousing and Storage of Property by Carriers at Port of New York, pending the perfecting and determination of an appeal to the Supreme Court of the United States from the Final Decree of this [fol. 404] Court herein, when entered, and for reasons thereof respectfully present to the Court as follows:

1. The aforesaid order of the Interstate Commerce Commission was entered on February 2, 1937, and requires the plaintiffs and each of them to cease and desist on or before April 15, 1937, and thereafter to abstain from leasing space to shippers in warehouses, buildings or piers at rentals which fail to compensate plaintiffs for the cost of providing the space leased, and from storing, handling or insuring goods of shippers at rates and charges which fail to compensate plaintiffs for the cost of performing such services. At the suggestion of this Court and the request of plaintiffs following the filing of plaintiffs' bill to enjoin, set aside, suspend and annul said order, the effective date of said order was from time to time postponed by the Commission until November 13, 1937, upon ten days prior notice of the filing of the tariffs required by the order.

2. On August 25, 1937, this Court filed an opinion announcing that plaintiffs' bill would be dismissed. A separate concurring opinion was filed by Judge Hulbert.

3. Plaintiffs, being advised that they have the right under the statutes to appeal to the Supreme Court of the United States from the final decree of this Court, when entered, dismissing their bill, purpose to exercise that right promptly after the decree of dismissal shall have been entered.

[fol. 405] 4. Plaintiffs requested the Commission by letter dated September 29, 1937, copy of which is annexed hereto as Exhibit A, to extend the effective date of said order pending determination of said appeal. The Commission by letter dated October 5, 1937, copy of which is annexed hereto as Exhibit B, has refused such extension. Said order, as above stated, unless the stay herein prayed for is granted, will therefore become effective on November 13, 1937, and by its terms plaintiffs will be required to discontinue the leasing arrangements it condemns by November

13, 1937, and to file, not less than ten days prior to that date, tariffs to be effective on that date discontinuing the existing storage, handling and insurance arrangements prohibited by said order.

5. If the order of the Commission shall become effective, and if upon the appeal the Supreme Court of the United States finds that said order should be enjoined, plaintiffs would, in such circumstances, be irreparably damaged in the following particulars, to wit:

(a) Plaintiffs' leases of space in warehouses, buildings and piers, which said order requires to be cancelled, are very numerous. In many instances they have been in effect for many years and have substantial portions of their terms yet unexpired. If the order becomes effective plaintiffs will be compelled summarily to terminate these leases in contravention of their provisions, with consequent risk of litigation and liability, and will have no adequate remedy at law for the reinstatement of such leases or the recoupment of losses if the Supreme Court of the United States finds that the order of the Commission should be enjoined.

(b) The tariffs of plaintiffs covering the storage, handling and insurance arrangements prohibited by the order provide for the performance by plaintiffs of extensive services for which they are entitled to the rates and charge named in said tariffs. If the order goes into effect temporarily and plaintiffs are required to cease performance of such tariff services, they will have no adequate remedy at law against the shippers for whom said tariff services otherwise would have been performed because of inability to prove the nature or extent of any such services during the period of temporary cancellation. The Commission, in its third report, holds that in the absence of such tariffs plaintiffs' performance of the services covered by the tariffs ordered cancelled is unlawful. The cancellation of the tariffs pending the appeal therefore automatically requires cessation of the services, which the plaintiffs serving New York Harbor have for many years regularly and continuously performed in connection with their transportation of freight, and to which arrangements the channels of business and transportation have long been adapted.

[fol. 407] (c) The termination of plaintiffs' leases and the cancellation of plaintiffs' tariffs covering storage, handling and insurance arrangements, pending determination of plaintiffs' appeal by the Supreme Court of the United States, will greatly upset and disturb the established business practices and routine of the many shippers who are now, and long have been, tenants under such leases, and who avail themselves of the tariff privileges of plaintiffs. If the Commission's order is sustained on appeal their business and operations will, of course, have to be adapted to the requirements of the order, but if the order is not so sustained a great loss will have been suffered by the business community without any compensating advantage to anyone and without warrant in law.

(d) The intervening warehousemen who are complainants against the condemned leases and practices will not be injured by staying the Commission's order pending appeal. The decision of the Commission awards to them no damages. No payments to them will be delayed by such a stay, and the putting of the order into effect during the pendency of the appeal, will otherwise be of no ascertainable advantage to them. Any competitive advantage they would gain by the temporary elimination of plaintiffs from the practice of making leases and rendering the tariff services condemned, would be, at most, very uncertain and speculative because there naturally would not be, during [fol. 408] the period of uncertainty as to the outcome of the appeal, any effective opportunity, or greater ability, on the part of the complaining warehousemen to rent their premises or to make new long-time contracts for the handling and storing of the freight now performed by plaintiffs.

6. The plaintiffs' arrangements as to the leasing of space in warehouses, buildings and piers, and the storage handling and insurance of goods, which are prohibited by the order, are of long standing in the commercial life of New York Harbor and were begun in good faith long prior to the present prohibition, at a time when it was not and could not have been anticipated that the "cost" to plaintiffs of providing such space and rendering such services, rather than the reasonable value thereof, was or might become the test of their lawfulness. The Commission's order requiring absolute adherence by plaintiffs

to the "cost" standard as the test of the lawfulness of their leasing of space and rendering of services, is, it is respectfully submitted, at least sufficiently at variance with other decisions of the Commission and the Court's as to the tests of lawfulness of such practices by carriers as to raise a reasonable question as to the soundness of the order.

7. The questions presented by this case as to the validity of the Commission's cost standard in determining the lawfulness of railroad leases and services are of far-reaching and general public consequence because of the prevalence [fol. 409] among railroads generally of similar leases and services. This fact; the irreparable injury to plaintiffs and their patrons that will follow the preemptory cancellation of such leases and services pending the appeal; the fact that nothing of any real value will be gained by anyone in enforcing the Commission's order pending the appeal; the fact that the order has thus far been voluntarily stayed to permit judicial determination of its validity, and the reasonable doubt which plaintiffs respectfully submit exists and as to the true state of the law upon these novel and far-reaching questions, all combine amply and sufficiently to justify the appeal and the stay, meanwhile, of the Commission's order, thereby preventing any disruption and interference with plaintiffs long-existing practices until their legality has been finally determined.

8. The Court has ample authority to grant the stay herein prayed.

Hovey v. McDonald, 109 U. S. 150, 161;
Cumberland Tel. Co. v. P. S. C. 260 U. S. 212, 219;
Virginian Ry. v. U. S. 272 U. S. 658, 668-672;
Beaumont, S. L. & W. Ry. v. U. S. 282 U. S. 74, 90;
Merchants' Warehouse Co. v. U. S. 283 U. S. 501,
513; Equity Rule 74.

In the case last cited, considerations identical with those enumerated herein were held by the Supreme Court sufficient to call for the granting of a stay such as is now sought by your petitioners.

[fol. 410]. Wherefore, in view of the foregoing considerations, your petitioners, plaintiffs herein, respectfully pray that this Court enter its order herein staying and suspend-

ing the aforesaid order of the Interstate Commerce Commission pending the perfecting and determination of the appeal to the Supreme Court.

Your petitioners are prepared to introduce evidence before this Court tending to show that irreparable loss would be done to plaintiffs and others if the said order of the Interstate Commerce Commission be not so stayed.

And your petitioner will ever pray, etc.

(Sgd.) Edwin H. Burgess, Solicitor for Plaintiffs, office and P. O. Address: 143 Liberty Street, Borough of Manhattan, City of New York. Charles B. Webber, Alex. H. Elder, Walter J. Larrabee, Marion B. Pierce, Thomas P. Healy, Carleton W. Meyer, Guernsey Orcutt, of Counsel.

Dated, New York, N. Y., October 13, 1937.

[fol. 411] EXHIBIT "A" TO APPLICATION

Lehigh Valley Railroad Company,

Law Department,

143 Liberty Street, New York City

R. W. Barrett, Vice-President and General Counsel.
E. H. Burgess, General Solicitor. C. A. Major, Asst. General Counsel. H. W. Smith, E. S. Shreve, P. G. Martin, Jr., Asst. General Solicitors.

Lyman M. Bass, General Attorney, Western New York, Marine Trust Building, Buffalo, New York.

Sept. 29, 1937.

In re Baltimore & Ohio R. R. Co. v. United States (Warehousing and storage of freight in New York Harbor.
Ex Parte 104—Part 6)

Hon. Carroll Miller, Chairman, Interstate Commerce Commission, Washington, D. C.

DEAR SIR:

The Railroads, plaintiffs in the above entitled suit, are now taking steps to perfect an appeal to the Supreme Court of the United States from the final decree, when entered, of the Statutory District Court for the Southern

District of New York, dismissing their bill for injunction against the Commission's order in Ex Parte 104, Part 6, the New York Warehouse Case. This appeal cannot, of course, be perfected and determined prior to the effective date of the order, which, as it now stands, is November 13, upon ten days prior notice of filing tariffs.

The purpose of this letter is to request, on behalf of plaintiffs, that the effective date of the order be postponed by the Commission pending the perfection and determination of this appeal. It is our view that the circumstances surrounding the practices of the carriers condemned by [fol. 412] the order are such as would lead the District Court that heard the case, upon application therefor by plaintiffs, to grant a stay and supersedeas pending such appeal. In this respect the situation in this case seems to be practically identical with the situation in Merchants Warehouse Co. v. U. S. 283 U. S. 501, in which the lower court granted a stay pending appeal; and this grant was found by the Supreme Court to be a proper exercise of the lower court's discretion.

In the instant case, as well as in the one cited, the railroad practices involved are of long standing and were begun in good faith at a time when it was not and could not have been anticipated that the cost standard, rather than the standard of reasonable value, was or might become the test of their lawfulness. Furthermore, the separate opinion of one of the judges of the lower court expresses concurrence with "some misgiving".

These circumstances, we believe, gave rise to a valid case of reasonable doubt as to the true state of the law on the important questions in this case, which justifies the appeal and presents a situation where the lower court will grant the stay. On this account, and in order to conserve the [fol. 413] time of the District Court and of all parties, will you kindly advise as to the willingness of the Commission to consent to a stay of the order pending determination of the appeal to the Supreme Court.

Yours very truly, (Signed) E. H. Burgess, General Solicitor.

BuT.

Copy to J. Stanley Payne, Esq., I. C. C. Washington, D. C.

[fol. 414-415]

Copy.

EXHIBIT "B" TO APPLICATION

Interstate Commerce Commission, Washington

Office of Carroll Miller, Chairman

October 5, 1937.

Mr. E. H. Burgess, General Solicitor, Lehigh Valley Railroad Company, New York, N. Y.

DEAR MR. BURGESS:

Replying to your letter of September 29th:

The Commission has denied your request for a further postponement of the effective date of its order in Ex Parte 104, Part 6, Warehousing and Storage of Freight in New York Harbor, pending the perfection and determination of your appeal to the Supreme Court of the United States.

Yours sincerely, Carroll Miller, Chairman.

[fol. 416] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed October 22, 1937

Upon the annexed petition of the plaintiffs for an order staying and suspending the operation and enforcement of the order of the Interstate Commerce Commission herein-after described, pending the perfecting and determination of appeal, let the defendant United States of America and the intervening defendants, Interstate Commerce Commission; American Warehousemen's Association, Merchandise Division; Warehousemen's Protective Committee; Boston Port Authority; and the City of Boston show cause at a term of this Court, held in the new Federal Court House, Foley Square, New York City, on the 21st day of October 1937, at 4 P. M. o'clock, why this Court should not issue its order staying and suspending the operation and enforcement of the order of the Interstate Commerce Commission made on February 2, 1937, as modified by an order made on September 23, 1937, in the proceeding entitled "Ex Parte,

104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y.", pending the [fols. 417-419] perfecting and determination of the appeal by said plaintiffs from the final decree, when entered, of this Court dismissing plaintiffs' petition for injunction,

And sufficient cause having been shown, let service of this order and of the application for said stay upon the respective attorneys of record for the United States of America, and the said intervening defendants, on or before the 20th day of October, 1937, before 12 o'clock noon be deemed sufficient.

Dated, New York, October 18th, 1937.

Harrie B. Chase, U. S. C. J. Robert P. Patterson,
U. S. D. J. Murray Hulbert, U. S. D. J.

A True Copy. Charles Weiser, Clerk. (Seal.)

[fol. 420] IN UNITED STATES DISTRICT COURT

[Title omitted]

STAY AND SUSPENSION OF ORDER OF INTERSTATE COMMERCE
COMMISSION—Filed November 1, 1937

The plaintiffs in the above entitled suit, having applied to this Court for an order staying and suspending the operation and enforcement of the order of the Interstate Commerce Commission made on February 2, 1937, as modified by an order made on September 23, 1937, in the proceeding entitled "*Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y.*", pending the perfecting and determination of the appeal by said plaintiffs from the final decree, when entered, of this Court dismissing plaintiffs' petition for an injunction restraining the operation and enforcement of said order as so amended, and said application having this day come on for hearing before this Court, and Edwin H. Burgess, Solicitor for plaintiffs, having been heard in support of said application and J. Stanley Payne, Esq., John J. Hickey, Esq., and A. Lane Cricher, Esq., in opposition thereto;

[fols. 421-423] It is Ordered and Decreed, That, the aforesaid order of the Interstate Commerce Commission as so modified, and the operation and enforcement thereof, be and the same hereby are stayed and suspended pending the perfection and determination of plaintiffs' appeal to the Supreme Court of the United States from the said final decree of this Court when entered.

It is Further Ordered and Decreed, That the requisite security for damages and costs on appeal be fixed in the sum of two thousand dollars.

Enter.

(Sgd.) Harrie B. Chase, U. S. C. J. (Sgd.) Robert P. Patterson, U. S. D. J. (Sgd.) Murray Hulbert, U. S. D. J.

[fols. 424-503] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law as Proposed by Defendants

Findings of fact as proposed by defendants are omitted from printing because they are identical with those subsequently found by the Court.

[fol. 504] DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

1. The hearings held by the Commission, in which all parties including plaintiffs herein were given full opportunity to present evidence and be heard, constituted the full hearing contemplated by section 15 (1) of the Interstate Commerce Act.

2. The Commission did not abuse the discretion vested in it by section 16a of the Act in denying plaintiffs' petition for a third hearing, filed after the issuance of the Commission's second report and after two lengthy hearings had been held in which plaintiffs were accorded full opportunity to present any relevant evidence. Nor were plaintiffs prejudiced by the denial of that petition, in which they represented that if a third hearing were granted they would

present evidence to the Commission to prove that their commercial warehousing rates and rentals and other charges collected by them for leasing space and for storing, handling and insuring goods were not less than the prevailing market values of such leases and services, since there was already before the Commission elaborate evidence bearing on the level of plaintiffs' warehousing rates and rentals as compared with the fair and reasonable value of the services performed under those rates, upon which the Commission had found, in both its first and second reports, that such rates and rentals were below costs and below the prevailing rates of other commercial warehousemen in the Port of New York District.

3. The Commission's findings, as made in its reports of December 12, 1933, June 8, 1936, and February 2, 1937, are supported by adequate evidence, and are sufficient support in law for the order of February 2, 1937.

[fol. 505] 4. The order is sufficiently certain and definite in terms to enable plaintiffs to comply therewith.

5. By the order, requiring plaintiffs to cease and desist from practices found to violate sections 2, 3 and 6 of the Interstate Commerce Act, the Commission exercised the power conferred upon it by section 15 (1) and other provisions of the Act, and in making the order the Commission did not exceed its authority.

6. The order is in all respects a lawful order.

7. The petition should be dismissed.

[fol. 506] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS

1. Upon adequate evidence the Commission found that the plaintiffs now do at less than cost all those things which the order prohibits them from doing at non-compensatory rates and charges.

2. The hearings held by the Commission, in which all parties, including plaintiffs herein, were given full opportunity

to present evidence and be heard, constituted the full hearing contemplated by section 15 (1) of the Interstate Commerce Act.

3. The Commission's findings, as made in its reports of December 12, 1933, June 8, 1936 and February 2, 1937, are supported by adequate evidence and are sufficient support in law for the order of February 2, 1937.

4. Providing such services as the plaintiffs do provide, and as were found to have been furnished for less than cost, violates the Interstate Commerce Act in that some shippers are given more favorable treatment than others in a like situation.

5. The practices of plaintiffs in performing at less than cost all those things which the order prohibits them from doing at non-compensatory rates and charges, constitute violation of section 6 of the Interstate Commerce Act, in that those persons permitted to receive such below-cost services, in effect, move their goods at less than tariff rates, and receive preferential treatment in violation of section 3 of the Interstate Commerce Act; others, not so favored, are discriminated against in violation of section 2 of said Act.

6. The Commission did not abuse the discretion vested in it by section 16a of the Act in denying plaintiffs' petition for a third hearing, filed after the issuance of the Commission's second report and after two lengthy hearings had been held in which plaintiffs were accorded full opportunity to present any relevant evidence. Nor were plaintiffs prejudiced by the denial of that petition, in which they represented that if a third hearing were granted they would present evidence to the Commission to prove that their commercial warehousing rates and rentals and other charges collected by them for leasing space for storing, handling and insuring goods were not less than the prevailing market value of such leases and services, since there was already before the Commission elaborate evidence bearing on the level of plaintiffs' warehousing rates as compared with the fair and reasonable value of the services performed under those rates, upon which the Commission had found in both its first and second reports, that such rates and rentals were below costs and below the prevailing rates of other commercial warehousemen in the port of New York district.

7. The order is based on findings supported by the evidence, which show it is within the jurisdiction of the Commission as derived from the Act. By the order requiring plaintiffs to cease and desist from practices found to violate sections 2, 3 and 6 of the Interstate Commerce Act, the Commission exercised the power conferred upon it by section 15 (1) and other provisions of the Act, and in making the order the Commission did not exceed its authority.

[fol. 508] 8. Bona fide transit arrangements are not affected by the Commission's order; only the commercial practices in which the carriers (plaintiffs) through stress of their competition have assumed a part of the cost of strictly commercial warehousing, storage, handling and insurance of goods, are so condemned; these voluntary practices, undertaken in order to get or keep the business, do violate the Act.

9. Violations of the Act would also result if such commercial services were performed for some shippers only at less than their reasonable worth. Here the inducement offered some shippers was purposed to get their business regardless of cost or charges of competing private warehousemen; and the prevailing charges or so-called market for these services performed by plaintiffs was set or made by these offerings below cost in the stress of competition between plaintiffs. In such situation and in giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers, and the granting of preferences either directly or indirectly, we can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both, at rates less than those of the published tariff, plus the cost of what warehousing and insurance is furnished, and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation. In the present instance commercial warehousing, storage and insurance were sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned. (N. Y. & H. R. Co. v. I. C. C., 200 U. S. 351.)

10. Cost, as set forth in the findings and order of the Commission, permits of definite calculation and the plaintiffs can readily comply with the order; we find no real substance to the argument that "cost" is too vague a term upon which to base an order; cost is certainly as definite as the fair

value standard for which the plaintiffs contend, and since it can be figured from past actual experience, is much more so. The order is sufficiently certain and definite in terms to enable plaintiffs to comply therewith.

[fol. 509] 11. Although the plaintiffs have covered what is termed "in-transit storage" by published tariffs, and charged uniformly those published rates, it by no means follows that sections 2 and 3 of the Interstate Commerce Act have not been violated by the practices forbidden by the order.

12. The practices found by the Commission and forbidden by the order, are commercial services and not transportation services required under the Act. The order properly condemns the practices that the plaintiffs have engaged in, storage and warehousing services which are not within their common carrier obligations, and the providing of such services to shippers below the cost thereof, thus reducing the cost to such shippers for the transportation of their goods. The tariffs covering the commercial services, now on file, are instruments which work violations of the Act, in that through them the plaintiffs hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate the plaintiffs for the cost of performing these services, and thereby plaintiffs violate sections 2, 3 and 6 of the Act.

13. These violations of the Act were amply proved and the practices condemned are performed by the plaintiffs for some shippers only, in order to get or keep the business. [fol. 510] The condemned services were voluntarily performed by the carriers for some shippers, commercial services at rates and charges which when added together do not return to the plaintiffs their published tariff rates for transportation plus the cost of the commercial services.

14. To the extent that such cost is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carriers' loss had been paid. Where the carriers sustain losses in performing voluntary commercial services for shippers as an inducement to them to buy transportation of the carriers at the published tariff rates for the goods as to which such voluntary commercial services are performed,

to the extent that the carriers are out-of-pocket because of [fol. 511] the performance of such voluntary commercial services furnished the shipper, their published tariff rates for such transportation are lowered or cut.

15. It is required that the published tariff rates for transportation be maintained, applicable alike to all shippers under like circumstances. Here the inducing commercial services which the carriers perform for some shippers to get or to hold their business have the effect, as appears by the evidence and as found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return; the transportation service is performed by the plaintiffs to those shippers for less than to others when the loss deduction results from commercial services performed below cost—whether at market value or not, particularly where the so-called market value or going charge, if such it may be termed, has been brought about by such stress of competition between the plaintiffs to get or to hold the business.

16. The vice the order is designed to do away with and to cure will not be cured if the fair value standard is substituted for the cost standard in respect to commercial services performed by plaintiffs to get or to hold transportation business and performed below cost. If the cost to the carriers of the inducing commercial services performed is more than the charges for those services, and here such is the case, the lessening effect upon the published tariff rates for transportation and the consequent violations of the Act, follow as surely whether the commercial services are charged at fair value or not:

17. We agree with the Commission that the condemned practices do violate the Act and hold that the order is supported by the findings, based on adequate evidence and is generally within the scope of the Commission's power.

18. The Commission properly found that the New York Central Railroad Company leased space in its warehouses to the Meilish Company and the Auto Storage Company at less than cost for the storage of automobiles; these lessees, [fol. 512] as the Commission found, are shippers in interstate commerce over the New York Central's lines. These lessees are competitors of warehouse companies in the New York district who are also shippers in interstate commerce

over that railroad. The New York Central paid allowances to these lessees for unloading and handling automobiles which are commercial services. In view of what was said as to commercial services and shippers within the meaning of the Act, in *Merchants Warehouse Co. v. U. S.*, 283 U. S. 303, we think the Commission's findings were fully justified by the evidence, and adequately support the order of the Commission with respect thereto.

19. The Central Railroad Company of New Jersey, through a wholly-owned subsidiary called the Newark Warehouse Company, built a large warehouse in Newark, N. J., in 1905; by 1934 there had accumulated a large deficit which was increased by the termination of the railroad of its lease for station space in 1932. After unsuccessful attempts to sell the building it was leased on June 1, 1934, to the Newark Central Warehouse Company, not connected with the railroad or its subsidiaries, at a varying annual rental, based in part upon the earnings of the lessee, with renewal privilege. The rental received during the first year was a little less than half the taxes on the building for that year and it is clear that the Commission's finding that the lease is non-compensatory is correct.

20. The Newark Central Warehouse Company, as justifiably found by the Commission, "engages in a general warehouse business and performs any and all services necessary in conducting that business. In many instances it has dominion for transportation purposes as consignee or consignor . . . over goods shipped in interstate commerce and stored by it. It engages in . . . the general [fol. 513] warehousing business, . . . including the handling of cars containing shipments for two or more consignees . . . In some cases the warehouse company pays the freight charges to the railroad and later collects from the owners of the goods."

21. The Newark Central Warehouse Company is a shipper in interstate commerce over the railroad lines in competition with other such shippers, and to the extent that it is allowed to use the railroad's warehouse (we treat the building as owned by the railroad as have the parties, though the title is in a fully-owned subsidiary) at the expense of the road for commercial purposes in connection with the transportation services it buys of the road, the

published tariff rates of the railroad are in effect cut to it. This becomes plain enough should the railroad let the company use the warehouse for nothing; and at inadequate rental has the effect of cutting the tariff rates to the favored lessee shipper in violation of sections 2, 3 and 6 of the Interstate Commerce Act.

22. The prohibition of the order with respect to the Central Railroad Company of New Jersey and the Newark Central Warehouse lease is the leasing at a non-compensatory rental of space which subsidizes and grants concessions to the lessee. The Commission drew the conclusion in its second report from sustaining evidence, " . . . that the warehouse is an adjunct of the railroad's traffic department (and) that the latter has made continuous and intensive effort to solicit traffic over its line for storage in the warehouse." While the carrier may lawfully minimize its losses from bad investments, it may not give concessions to a favored shipper which, in effect, permit the railroad to cut its tariff rate to that shipper.

[fols. 514-515] 23. All carriers subject to the provisions of the Interstate Commerce Act must stand and be treated alike, whether they have made poor investments or not.

24. Charges for commercial services, performed below cost, as considered by the Commission, are readily distinguishable from what are properly transportation services, and do not come into conflict with the principle that reasonable tariff rates need not be sufficient to give railroads a fair return on every transportation service rendered in respect to every part of its property so used.

25. The petition should be dismissed.

[fol. 516] IN UNITED STATES DISTRICT COURT

[Title omitted]

Plaintiffs' Objections to Defendants' Proposed Findings and Conclusions and Plaintiffs' Counter Proposals—Filed April 28, 1938

Come Now the plaintiffs in the above entitled suit and respectfully present the following objections to the findings

of fact and conclusions of law proposed by defendants herein:

I. PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED FINDINGS OF FACT

1. Defendants' proposed findings of fact are 179 in number and comprise eighty-two mimeographed sheets. They consist of long, discursive and copied recitals from the pleadings and the discussion in the reports of the Commission. In large part they are not, in substance or form, findings as to the essential ultimate facts, contemplated by Equity Rule 70½.

2. Defendants' proposed findings do not summarize the essential ultimate facts which are dealt with in the Court's opinion and upon which the issues of law in this case turn, [fol. 517] but rather contain an exhaustive re-statement and narration of all the discussion in the Commission's three reports. Defendants' counsel, as their letter of January 20, 1938 to this Court shows, have, in fact, not confined themselves to the Commission's reports but have gone into the voluminous evidential matter before the Commission which underlies those reports and the findings of the Commission therein set forth. In other words, they propose that this Court make findings, upon the basis of the evidence introduced before the Commission, upon the mass of underlying evidentiary matters discussed in reports of the Commission.

3. Plaintiffs respectfully submit that such is not the function of the Court under Equity Rule 70½. Rather, the function of the Court under the Rule should be to find the essential ultimate facts upon which it rests its judgment upon the issues presented by the bill.

4. The essential ultimate facts in this case are very simple, as is shown by the Court's opinion. The principal ultimate fact, according to the opinion and as found by the Commission, is that plaintiffs make leases and perform services at less than "cost". Plaintiffs in this Court have only questioned the sufficiency in law of the findings the Commission made. They have not raised any issue as to the sufficiency of the evidence underlying the Commission's finding that [fol. 518] plaintiffs' leases and services are made and performed at less than "cost". This is recognized by the Court's opinion, which states:

"In view of the restricted nature of the issues presented, it will not be necessary to state at length the substance of these (the Commission's) reports to which reference, however, is made."

In these circumstances, plaintiffs submit that the elaborate re-statement of subsidiary evidential matters suggested in defendants' proposed findings of fact is too general and will obscure, rather than clarify, the essential ultimate facts upon which the decision of this Court rests.

5. The case of *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454, referred to by defendants' counsel in their letter of January 20, 1938, to this Court, is no authority for the discursive character of evidentiary findings proposed by defendants. In that case an order of the Commission requiring the railroads to install power reverse gears on locomotives was before the Supreme Court for review. The record before that Court, consisting largely of an abstract of the evidence before the Commission, consisted of two volumes of 1581 pages. In the case, as argued before the lower court and before the Supreme Court, there were, contrary to the situation in the present case, many important disputes as to whether the evidence before the Commission [fol. 519] (which was much more voluminous than the evidence in the instant case) was sufficient to sustain the fact findings made by the Commission. Nevertheless, the findings of fact, adopted under Rule 70½ by the District Court, were only five in number and occupied only six printed pages of record before the Supreme Court. Almost the whole bulk of these five findings consisted of statements of facts which the Commission, in the judgment of the District Court, improperly failed to consider, or which the Commission improperly found upon insufficient evidence.

In view of such state of the record before it in that case, the statement of the Supreme Court (293 U. S. 454, 465), referred to by defendants' counsel in their letter, that Rule 70½ requires "comprehensive" findings, cannot be construed as imposing upon the District Court the duty to enter the field reserved to the Commission and recite all the evidential facts which it is the province of the Commission to consider in its report. *Florida v. United States*, 282 U. S. 194, 215. In the instant case the lack of material dispute

about the essential ultimate facts permits an even shorter statement to be made in the findings of this Court.

6. For these reasons plaintiffs respectfully submit that defendants' proposed findings of fact are not in the form nor of the nature and character contemplated by Equity [fol. 520] Rule 70½ as interpreted in Pub. Serv. Com. v. Wis. Tel. Co., 289 U. S. 67. Plaintiffs, therefore, respectfully object to defendants' proposed findings of fact and urge that they be not approved or made by this Court.

II. PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

1. Plaintiffs object to all of defendants' proposed conclusions of law on the ground that they are not conclusions of law but are only general declarations of the regularity and validity of the proceedings and order of the Commission.

2. Plaintiffs specifically object to defendants' proposed Conclusion of Law No. 2 because it asserts that "there was already before the Commission elaborate evidence bearing on the level of plaintiffs' warehousing rates and rentals as compared with the fair and reasonable value of the services performed under those rates," and that upon this evidence "the Commission had found, in both its first and second reports, that such rates and rentals were below costs and below prevailing rates of other commercial warehousemen in the Port of New York District." No support for the italicized portions of this conclusion is offered by defendants' counsel in their 179 proposed findings of fact, except for the barest intimation in findings 28 and 33. But neither [fol. 521] the proposed findings, nor the Commission's reports, nor its order, purports to base the requirements of the order upon anything but the "cost" foundation. The order specifically refers to "cost" to the exclusion of fair and reasonable value or prevailing rates of other warehousemen. The formal findings of the Commission (see its second report, Exhibit F to plaintiffs' petition, 216 I. C. C. 291, 310-11, 318-19, 323-24, 329, 332, 337, 355-6) assert only that plaintiffs' rentals and charges are below "cost" and do not purport to assert that such rentals and charges are below the prevailing rates of other warehousemen or are less than the reasonable value of the leases or services in question. Thus, it is plain that the Commission did not in any

case base its order upon the premise that plaintiffs' rentals and charges were less than the prevailing rates or less than the reasonable value of the services. This is shown by the opinion of this Court which, throughout, treats the Commission's reports as having found that plaintiffs make leases, etc., at less than "cost" but which nowhere considers that the Commission found plaintiffs' rentals and charges to be less than prevailing charges of competing warehousemen or less than the reasonable value of the rentals or services.

The language in Conclusion No. 2, as suggested by defendants' counsel, is without support in this Court's opinion. In fact, it is inconsistent with the statement of this Court in [fol. 522] its opinion, referring to the Commission's denial of plaintiffs' petition for rehearing, as follows:

"The common complaint of all the plaintiffs is that the order was made after the denial of their motion to reopen the proceedings for the purpose of introducing evidence to show that the condemned services were provided at charges equivalent to their fair and reasonable value; that there are no findings sufficient to support it in that the Commission did not find that what the plaintiffs provided for shippers at less than cost was provided at less than the fair and reasonable value; and that cost is too vague and indefinite a term to make the order sufficiently definite to enable them to comply.

All this boils down to the one issue of whether or not the findings are sufficient support in law for the order made. If they are the plaintiffs were not prejudiced by the denial of their motion to reopen the proceedings. It is clear that the order must be based upon findings, supported by the evidence, which show it to be within the jurisdiction of the Commission as derived from the Act. *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499. The power to make the order, therefore, depends upon whether the providing of such services as were found to have been furnished for less than cost violates the Act in that some shippers are given more favorable treatment than others in like situation. It is not denied that that result would follow if such services were performed for some shippers only at less than their reasonable worth but it is insisted that reasonable worth and not cost is the true criterion by which their practices must be tested in the light of the provisions of the act.

To the extent that such cost is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carrier's loss had been paid. And this is so whether the voluntary commercial services performed by the carriers to get or hold business in the face of competition are charged at their fair value or not. If the carriers sustain losses in performing voluntary commercial services for shippers as an inducement to them to buy transportation of the car- [fol. 523] riers at the published tariff rates for the goods as to which such voluntary commercial services are performed, it can make no difference, in the effect of such practices on the tariff rates, that the voluntary commercial services were charged at their fair value if that happens for whatever reason to be less than the cost to the carriers. To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut."

Even if, applying the language of Justice Cardozo in *United States v. C. M. St. P. & P. R. Co.*, 294 U. S. 499, 510, there may "lurk in this report phrases or sentences suggestive of a different meaning;" i. e., that the report may at times imply that there was evidence before the Commission that plaintiffs' warehousing rates and rentals were below the prevailing rates of other commercial warehousemen, "the difficulty is that it (the Commission) has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude." Obviously, any "phrases or sentences suggestive of a different meaning" that may "lurk" in the report are not a proper basis for a conclusion of law to be adopted by this Court, where, as here, the Commission's reports and the order itself plainly show that the order is based upon a substance (i. e. "cost") wholly different from the subject matter of any such lurking phrases.

If Conclusion of Law No. 2 as proposed by defendants' [fol. 524] counsel, together with their proposed Findings of Fact Nos. 28 and 33, may be intended to request this Court to review the evidence before the Commission and, upon the basis of that evidence, to attempt to find that which the Commission did not find; i. e., whether plaintiffs' rentals and charges are less than the reasonable value of the leases or

services, or less than the prevailing market values thereof, then, under the decision of the Supreme Court in *Florida v. United States*, 282 U. S. 194, the rejection of such proposed conclusion and findings is mandatory. In that case, the Court said, at page 215:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company v. United States*, ante, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." (Italics supplied.)

If this Court should be disposed to adopt findings of fact and conclusions of law in addition to its opinion, Conclusion No. 3 as hereinafter proposed by plaintiffs should be adopted, it is respectfully submitted, in lieu of Conclusion No. 2 as proposed by defendants.

[fol. 525] III. PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

As above pointed out, the opinion of the Court itself contains an adequate recital of the essential facts and conclusions of law upon which the decision is grounded. It fully meets the requirements of Equity Rule 70½ for findings of fact and conclusions of law. Defendants therefore respectfully request that the Court specifically adopt said opinion as its findings of fact and conclusions of law under Rule 70½.

If, however, the Court be of the opinion that a separate statement of its findings of fact and conclusions of law is desirable, defendants respectfully submit and urge the adoption of the following:

FINDINGS OF FACT

Pursuant to Equity Rule 70½ the Court finds the following facts:

1. The plaintiffs herein, The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and the Pennsylvania Railroad Company, are competing common carriers engaged in the transportation of freight by railroad in interstate or foreign commerce, or both, to and from what is commonly known as the Port of New York District, and are subject to the Interstate Commerce Act (49 [fol. 526] U. S. C. A. Ch. 1, Part I).

2. The defendant named in the plaintiffs' petition is the United States of America. The Interstate Commerce Commission, hereinafter called the Commission, the Warehousemen's Protective Committee, an organization composed of fifty-seven warehousemen operating commercial warehouses in the Port of New York District, the American Warehousemen's Association, Merchandise Division, a national association of commercial warehousemen, the City of Boston and the Boston Port Authority, complainants or interveners in the proceeding before the Commission, intervened herein as defendants.

3. Plaintiffs severally own, control, operate or lease warehouses, buildings and piers in the Port of New York District and, either in their own names or through subsidiary or affiliated companies directly or indirectly, by lease or other arrangements, provide warehouse space and services for numerous persons, some of whom ship freight in interstate commerce over plaintiffs' railroads. In such warehousing activities, plaintiffs are competitors among themselves and also with private companies owning and operating warehouses in the Port of New York District. As common carriers, plaintiffs are also engaged in involuntary storage of freight incidental to the transportation services they perform, but such involuntary storage, incidental to and a part [fol. 527] of transportation, as defined in Section 1 (3) of the Interstate Commerce Act, is not involved in this suit. Plaintiffs also voluntarily hold themselves out by tariffs,

published and filed with the Interstate Commerce Commission, pursuant to Section 6 of the Interstate Commerce Act, to store and handle and, with the exception of the Central Railroad Company of New Jersey, insure goods in transit over their respective railroads at rates and charges which are stated in said tariffs.

4. The Interstate Commerce Commission instituted, on July 6, 1931, an investigation on its own motion in a proceeding entitled Ex Parte 104, Practices of Carriers Affecting Operating Revenue and Expenses, in which all common carriers by railroad subject to the Interstate Commerce Act were made parties, to determine whether those carriers were being operated economically and efficiently within the provisions of Sections 12 and 15 (a) of the Act. Thereafter, its attention was especially directed by complaints of warehousemen in the Port of New York District to the warehousing practices of the plaintiffs in that district and, on January 6, 1932, it instituted a proceeding known as Part VI of Ex Parte 104, Warehousing and Storage of Property by Carriers at Port of New York, in connection with its general proceeding above mentioned, for the purpose of " . . . [fol. 528] establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District . . .".

5. Pursuant to notice given, the Commission from time to time, held hearings in said proceeding at which evidence was presented by the Commission by plaintiffs and by the complaining warehousemen, and, on December 12, 1933, issued its first report (198 I. C. C. 134), containing its findings of fact, conclusions and decisions, wherein it admonished the plaintiffs herein "that their practices and charges should be adjusted in conformity with the principles announced?" in said report. The Commission made no order at that time. Thereafter, pursuant to notice given, the proceeding was reopened and further hearings were held and, on June 8, 1936, the Commission issued a further report and entered an order thereupon (216 I. C. C. 291), but subsequently suspended said order from time to time and superseded it by further order, dated February 2, 1937, which was issued upon a report of the Commission (220 I. C. C. 102) after oral argument and reconsideration of said proceeding. The effective date of said order of February 2, 1937, was, by its

terms, April 15, 1937. By subsequent orders, the Commission postponed the effective date until November 13, 1937.

6. By petition filed March 10, 1937, plaintiffs seek to enjoin and set aside said order of the Commission entered Feb-[fol. 529] ruary 2, 1937, insofar as said order requires plaintiffs—

(a) To cease and desist from permitting shippers in interstate commerce over their lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by or affiliated with plaintiffs in the Port of New York District at rates and charges which fail to compensate them for the cost of providing said space.

(b) To cease and desist from storing goods shipped over their lines in interstate commerce or providing storage space to shippers in interstate commerce over their lines for commercial storage of goods, as fully defined in the Commission's reports, at rates and charges which fail to compensate them for the cost of storing such goods or providing such storage space.

(c) To cease and desist from directly or indirectly handling goods incident to commercial storage, as fully defined and described in said reports, at said warehouses, buildings or piers for shippers in interstate commerce at rates and charges which fail to compensate them for the cost of said handling.

(d) To cease and desist from insuring goods shipped over their lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described [fol. 530] in said reports, at said warehouses, buildings or piers in the Port of New York District for shippers in interstate commerce at less than the cost of providing such insurance. (This requirement of the order is directed against all the respondent carriers except The Central Railroad Company of New Jersey which, as the Commission found, does not engage in such insurance).

(e) To cease and desist from applying, by means of tariffs now on file with the Commission, non-compensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods

shipped over their lines in interstate commerce, which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

7. By said petition the Jersey Central also seeks to enjoin and set aside that part of the order requiring it to cease and desist from "subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said . . . Carrier".

8. Said order also required the Erie to cease and desist from subsidizing and granting concessions to the Seaboard [fol. 531] Terminal & Refrigeration Company by means of excessive rentals paid for space leased from that company, but the Commission, by order dated April 9, 1937, rescinded this part of the order and reopened the proceeding insofar as it relates to this particular subject matter for further hearing. Therefore, the question of the validity of this requirement of the order is not in issue in this suit.

9. Answers to the plaintiffs' petition in this suit were filed by the United States, the Interstate Commerce Commission and other parties intervening as defendants.

10. On April 22, 1937, the cause came on for final hearing upon the merits before this Court, specially constituted of three judges as required by the Urgent Deficiencies Act of October 22, 1913, and at said hearing a certified copy of the evidence and oral argument before the Commission in the above-mentioned proceeding was introduced and received in evidence.

11. As the Commission found, plaintiffs were and are making, in the Port of New York District, leases of buildings and of space in buildings, warehouses and on piers, and rendering the services which the Commission's order (summarized in Findings of Fact Nos. 6 and 7 hereinabove) prohibits them from doing at rentals and charges which fail to compensate them for the "cost" of so doing. [fol. 532] In so doing, plaintiffs compete with one another and with warehousemen operating commercial warehouses. Shippers who receive from plaintiffs the below-cost leases and services of the kinds mentioned in said order are thus

in effect permitted by plaintiffs to have their goods transported at less than plaintiffs' lawfully established tariff rates and charges for transportation, resulting indirectly in violation of Section 6 of the Interstate Commerce Act, and thereby receive treatment which is unjustly discriminatory, preferential of them and prejudicial to other shippers in violation of Sections 2 and 3 of the Interstate Commerce Act.

12. As found by the Commission, plaintiffs store and handle and, with the exception of the Central Railroad Company of New Jersey, insure, goods, in warehouses and other storage facilities provided by them, while such goods are in transit over their respective railroads. Plaintiffs, as required by Section 6 of the Interstate Commerce Act, publish in their tariffs and uniformly observe the charges applicable for such in-transit services. Nevertheless, to the extent that such plaintiffs provide such in-transit services to shippers at tariff rates and charges which fail to compensate plaintiffs for the cost thereof, plaintiffs reduce the tariff charges to such shippers for the transportation of their goods, in violation of Section 6 of the Interstate Commerce Act, and thereby discriminate in favor of such shippers and against other shippers, and unduly prefer such shippers and unduly prejudice other shippers, in violation of Sections 2 and 3 of the Interstate Commerce Act.

13. Plaintiff, The New York Central Railroad Company, leases space in its warehouses, at less than cost, to J. A. Mellish Warehouse Company, Inc., and to Kingsbridge Auto Storage & Warehouse Company. Said lessees are shippers over that plaintiff's railroad and are competitors of other warehouse companies in the Port of New York District who are also shippers in interstate commerce over said railroad. Said lessees also receive tariff allowances from said plaintiff for unloading and handling automobiles, which are commercial services. Said plaintiff in so doing grants concessions to said Mellish Company and Kingsbridge Company in violation of Section 6 of the Interstate Commerce Act and thereby discriminates in their favor and against other shippers, and unduly prefers them and unduly prejudices other shippers, in violation of Sections 2 and 3 of the Interstate Commerce Act.

CONCLUSIONS OF LAW

1. The hearings held by the Commission, in which all parties, including plaintiffs herein, were given full opportunity [fol. 534] to present evidence and be heard, constituted the full hearing contemplated by Section 15 (1) of the Interstate Commerce Act.

2. The Commission's findings, as made in its reports of December 12, 1933, June 8, 1936, and February 2, 1937, are supported by adequate evidence, and are sufficient support in law for its order of February 2, 1937.

3. Since the findings of the Commission, as made in its reports of December 12, 1933, and June 8, 1936, and subsequently modified by its report of February 2, 1937, were supported by adequate evidence and were sufficient in law to support the order complained against, the Commission did not abuse the discretion vested in it by Section 16a of the Act in denying plaintiffs' petition for a third hearing, filed after the issuance of the Commission's report of June 8, 1936.

4. The order is sufficiently certain and definite in terms to enable plaintiffs to comply therewith.

5. The validity of the Commission's order of February 2, 1937, is not affected by the fact that the Commission's reports and said order do not define "cost" or "non-compensatory rentals" and do not indicate how "cost" or compensatory rentals should be computed.

[fol. 535-542] 6. For the purpose of passing on the validity of the Commission's said order as to the lease of a warehouse by the Central Railroad Company of New Jersey, to the Newark Central Warehouse Company, it is not necessary that the Court determine what treatment "should be accorded excessive investment under accepted accounting standards in figuring cost".

7. Plaintiffs, in making leases and rendering services, as more specifically stated in Findings of Fact Nos. 11, 12 and 13 hereinabove, at rates and charges which fail to compensate plaintiffs for the cost thereof, make concessions from their duly published rates and charges to shippers who receive the benefit of said leases and services, in violation of Section 6 of the Interstate Commerce

Act, and thereby unjustly discriminate in favor of said shippers and against other shippers and unduly prefer said shippers and unduly prejudice other shippers, in violation of Sections 2 and 3 of the Interstate Commerce Act.

8. The petition should be dismissed.

March 2, 1938.

[fol. 543] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 84402

THE BALTIMORE & OHIO RAILROAD COMPANY et al., plaintiffs,

v.

UNITED STATES OF AMERICA et al., Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 23, 1938

Pursuant to Equity Rule 70½, the Court finds the following facts:

1. The plaintiffs, The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company, are common carriers engaged in the transportation of freight by rail in interstate and foreign commerce, and are subject to the provisions of the Interstate Commerce Act.* They operate lines of railroad extending in a general westwardly direction from the Port of New York District to various western points and are keen competitors, each with the others, for both eastbound and westbound domestic and foreign commerce to and from the Port of New York District.

*The common designations of these carriers, i. e., B. & O., Jersey Central, Lackawanna, Erie, Lehigh Valley, New York Central and Pennsylvania, are generally used herein.

[fol. 544] 2. The defendant named in the plaintiffs' petition is the United States of America. The Interstate Commerce Commission, hereinafter called the Commission, the Warehousemen's Protective Committee, an organization composed of 57 warehousemen operating commercial warehouses in the Port of New York District, the American Warehousemen's Association, Merchandise Division, a national association of commercial warehousemen, the City of Boston and the Boston Port Authority, complainants or interveners in the proceeding before the Commission, intervened herein as defendants.

3. By petition filed March 10, 1937, plaintiffs seek to enjoin and set aside an order of the Commission entered February 2, 1937, in a proceeding entitled Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y., insofar as said order requires plaintiffs

(a) To cease and desist from permitting shippers in interstate commerce over their lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by or affiliated with plaintiffs in the Port of New York District at rates and charges which fail to compensate them for the cost of providing said space.

(b) To cease and desist from storing goods shipped over their lines in interstate commerce or providing storage space to shippers in interstate commerce over their lines for commercial storage of goods, as fully defined in the Commission's reports, at rates and charges which fail to compensate them for the cost of storing such goods or providing such storage space.

(c) To cease and desist from directly or indirectly handling goods incident to commercial storage, as fully defined and described in said reports, at said warehouses, buildings [fol. 545] or piers for shippers in interstate commerce at rates and charges which fail to compensate them for the cost of said handling.

(d) To cease and desist from insuring goods shipped over their lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and

described in said reports, at said warehouses, buildings or piers in the Port of New York District for shippers in interstate commerce at less than the cost of providing such insurance. (This requirement of the order is directed against all the respondent carriers except The Central Railroad Company of New Jersey which, as the Commission found, does not engage in such insurance.)

(e) To cease and desist from applying, by means of tariffs now on file with the Commission, noncompensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce, which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

4. By said petition the Jersey Central also seeks to enjoin and set aside that part of the order requiring it to cease and desist from "subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said . . . carrier".

5. Said order also required the Erie to cease and desist from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of excessive rentals paid for space leased from that company, but the Commission, by order dated April 9, 1937, rescinded this part of the order and reopened the proceeding insofar as [fol. 546] it relates to this particular subject matter for further hearing. Therefore, the question of the validity of this requirement of the order is not in issue in this suit.

6. Answers to the plaintiffs' petition in this suit were filed by the United States, the Interstate Commerce Commission and other parties intervening as defendants.

7. On April 22, 1937, the cause came on for hearing before this Court, specially constituted of three judges as required by the Urgent Deficiencies Act of October 22, 1913, and at said hearing a certified copy of the evidence and oral argument before the Commission in the above-mentioned proceeding was introduced and received in evidence.

8. On July 6, 1931, the Commission instituted an investigation on its own motion in a proceeding entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses*, in which all common carriers by rail subject to the Interstate Commerce Act were made parties, to determine whether those carriers were being operated economically and efficiently within the provisions of sections 12 and 15a of the Act. Thereafter the Warehousemen's Protective Committee and other operators of commercial warehouses in the Port of New York District filed complaints with the Commission especially directing the Commission's attention to the warehousing practices of the carriers serving that district, including plaintiffs herein, alleging that these practices violated sections 2, 3 and 6 of the Interstate Commerce Act, and dissipated the carriers' revenues, and requesting the Commission to institute an investigation into such practices. On January 6, 1932, the Commission instituted such a proceeding, on its own motion, designating said proceeding as *Part VI of Ex Parte 104, Warehousing and Storage of Property by Carriers at Port of [fol. 547] New York*, for the purpose of " * * * establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District * * * ." Each of the plaintiffs herein was named as a party respondent in said proceeding.

9. Pursuant to notice given, hearing in said proceeding was held at New York, N. Y., during the period June 27 to July 13, 1932, at which time evidence was presented by counsel for the Commission and by counsel for the complaining warehousemen. Thereupon, to give the respondents ample time to prepare their defense, the proceeding was adjourned until a later date. Pursuant to notice given, the hearing was resumed at Washington, D. C., August 22, 1932, at which time evidence was presented by the respondents. At these hearings voluminous evidence was taken. The transcript of the testimony covers approximately 2,343 typewritten pages, and 234 documentary exhibits were received.

10. On March 13, 1933, the Commission's examiners issued a proposed report which was served upon the parties, and to this proposed report exceptions were filed by the re-

spondents and by certain other parties. Oral argument before the Commission was waived.

11. On December 12, 1933, the Commission issued its first report in said proceeding (198 I. C. C. 134), containing its findings of fact, conclusions and decisions, wherein it admonished all carriers subject to the Interstate Commerce Act, including plaintiffs herein, "that their practices and charges should be adjusted in conformity with the principles announced in this report." The Commission made no order at that time.

[fol. 548] 12. The respondents failed to correct the violations of the law as pointed out in the findings made in said report and the Commission, by order dated May 6, 1935, reopened said proceedings for further hearings.

13. Pursuant to notice given, further hearings were held in said proceeding at New York during the period from June 24 to July 6, 1935, and 1,629 additional pages of testimony were taken, together with 68 additional documentary exhibits. Thereafter further briefs were filed in said proceeding, but oral argument was again waived.

14. On June 8, 1936, the Commission issued its report on further hearing in said proceeding (216 I. C. C. 291), containing its findings of fact, conclusions and decisions based upon the enlarged record then before it. With said report the Commission issued an order of the same date, but subsequently suspended this order from time to time and it was superseded by the Commission's order of February 2, 1937.

15. After the issuance of the report and order of June 8, 1936, the carriers petitioned the Commission to grant them a third hearing, which petitions were denied. However, the Commission reopened the proceeding for oral argument and reconsideration. Oral argument was held before the Commission November 23, 1936.

16. On February 2, 1937, the Commission issued its report on argument and reconsideration (220 I. C. C. 102) and with this report made the aforesaid order of February 2, 1937.

17. The effective date of said order of February 2, 1937, by its terms, was April 15, 1937. By subsequent orders the

Commission postponed this effective date until November 18, 1937.

[fol. 549] 18. The commercial warehouse business has been an important factor in the conduct of the country's commerce for more than a hundred years. It has always been necessary for a tradesman, dealing in large quantities of merchandise either to provide and operate his own warehouse facilities or to use those provided by public warehousemen for the storage and distribution of his goods.

19. Sixty-five warehouse companies, not affiliated with the plaintiffs, are engaged in the commercial warehouse business in the Port of New York District. Their warehouses are located in various sections of Manhattan, in Brooklyn, Jersey City, Hoboken, Newark and other locations in the Port District. Forty-three of these companies operate merchandise warehouses and 22 operate cold storage warehouses. The operations of these two types of warehouses are similar except that the merchandise warehouses do not handle articles requiring storage under refrigeration. These companies are members of the Warehousemen's Protective Committee, and other warehousemen's associations, and they made complaint, as aforesaid, to the Commission against the warehousing practices of the plaintiffs.

20. These warehousemen, both merchandise and cold storage, are engaged in the storage and warehousing of goods shipped in interstate commerce to and from all sections of the United States over plaintiffs' lines, and their business is dependent for existence upon the plaintiffs' transportation services coupled with reasonable and non-discriminatory rates and practices.

21. The principal business solicited and performed by these warehousemen is the handling, storage, for long or short terms, and distribution of freight with all of the incidental services in connection therewith, such as issuance of [fel. 550] warehouse receipts, inspection, cooperage, marking, weighing, and reshipping. Such services are performed on carload and less-than-carload quantities, and regardless of the form of transportation used in shipment or reshipment. Goods such as coffee, sugar, cocoa, cotton, rubber, and metals are stored in licensed warehouses and bought and sold on the various produce exchanges. Mer-

chants and brokers, whose places of business are located in the more active trading sections of the city where high rents preclude the use of space for storage of surplus stocks, employ the warehousemen to store and distribute their goods. Assembling and distribution of carload lots is also an important function of the public warehousemen, permitting tradesmen to obtain the advantage of carload rates lower than less-than carload rates. By various rules of the Consolidated Freight Classification the trunk-line carriers declare that they will neither load, unload, assemble, nor distribute carloads of goods which they transport at carload rates.

22. Plaintiffs are parties to the Consolidated Freight Classification, filed with the Commission under section 6 of the Interstate Commerce Act, with the binding force of a tariff schedule. This classification contains rules which distinguish carload from less-than-carload service. Rule 14 confines the service which the carriers will render with respect to carload shipments to one consignor and one consignee. By Rule 23, carriers may not distribute carloads of freight in less-than-carload lots, nor assemble smaller lots into carloads. By Rule 27 it is provided that carload freight, carried at carload rates, shall be loaded and unloaded by the owner or consignee. These rules, in connection with the provisions of the uniform bill of lading, the demurrage tariff, and the Jones storage tariff, provide guidance for simple and orderly terminal service on shipments of freight for which the storage service afforded is short and is a necessary step in the tendering of outbound shipments for transportation and the delivery of inbound shipments.

23. All seven plaintiffs, in addition to their operations as common carriers, engage extensively in the commercial warehouse business in the Port of New York District. Their warehouses, which they operate either in their own names or through subsidiary or affiliated warehouse companies, for the commercial storage of goods as distinguished from storage incidental to transportation, are located in the Boroughs of Manhattan and the Bronx, New York City, and in Jersey City, Hoboken, Staten Island and elsewhere in the Port of New York District.

24. Plaintiffs' warehousing operations, whether carried on through railroad departments or through subsidiary or

affiliated companies, are in all respects voluntary warehousing activities, such as are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangements and dealing with patrons of warehouses.

25. As common carriers plaintiffs are also engaged in the involuntary storage of goods incidental to the transportation services they perform, but such involuntary storage incidental to and a part of transportation, as defined in section 1 (3) of the Interstate Commerce Act, is not involved in this suit, inasmuch as the Commission's order here in question relates only to voluntary, commercial warehousing and storage practices as performed by plaintiffs.

[fol. 552] 26. As commercial warehousemen, plaintiffs are competitors among themselves and with the private commercial warehousemen engaged in similar business in the District. As found by the Commission, each of the seven plaintiffs "now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies" in the New York District. "The forms of title to the warehouses are various. In a number of instances the respondents lease all or parts of buildings for warehousing operations; in others they own the ground, aided in financing the structures located thereon, and lease from their own subsidiaries space in such buildings; and in still others they own the land and structures, but lease them in entirety or in large part to subsidiary corporations for warehouse operations. In the variety of such arrangements, the result is always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purposes railroad management may have in mind.

27. The motive of the plaintiffs in engaging in the commercial warehousing business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services.

28. Plaintiffs directly or through dominated and controlled subsidiaries seek out the larger shippers and offer them lower rates for warehousing services and warehouse [fol. 553] space than the private warehousemen. It appears of little concern to the railroads that their charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation. Those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit.

29. The conflict of interests is not confined to rail carriers and private warehousemen, but concerns also the rail carriers as among themselves. The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business. The conflict of interests applies also as between larger shippers, controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses.

30. The seven plaintiffs have extended financial aid to their various warehouse affiliations, as shown more in detail hereinafter. It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which the complainant warehouses cannot meet.

31. The solicitation of goods for warehousing is an important activity in the conduct of the business. Plaintiffs have and use their active and efficient traffic departments for the solicitation of business throughout the country. The private warehousemen, with their smaller forces, cannot compete in this respect.

[fol. 554] 32. The complaining private warehousemen, claiming that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the plaintiffs in engaging in what they consider trade activities and not common-carrier service, introduced testi-

mony and exhibits in the Commission proceeding, neither of which was refuted by the respondent carriers, which show that they have lost business in practically every form of warehousing to the respondents' affiliated and storage companies.

33. In addition to furnishing warehousing services, the plaintiffs, or their subsidiaries, also rent space in stations, piers, or warehouse buildings to certain shippers for various purposes, and the rental exacted, the Commission found, "is not only below the prevailing rates but is noncompensatory."

34. During the period from 1926 to 1934, there was intense competitive building of large new warehouses by these carriers. The first of these, completed November 1, 1927, was the 10-story warehouse of the Seaboard Terminal & Refrigeration Company, containing 800,000 square feet of space, sponsored by the Erie and located upon and served exclusively by the Erie, in Jersey City. This was followed by the 8-story warehouse building, containing over a million square feet of floor space, built by the Lackawanna on its tracks near the water-front in Jersey City, completed in April 1930. At about the same time the Pennsylvania completed its Harborside warehouse, located on the water-front in Jersey City, containing 2,100,000 square feet. In 1929 the Lehigh Valley constructed its Lehigh Bronx Terminal Warehouse, a 12-story building located near the Lehigh Valley's Bronx Terminal on the Harlem River, New York City, containing 370,000 square feet; and in 1930 the Lehigh [fol. 555] Valley completed its Starrett-Lehigh Building, on 27th Street from 11th to 13th Avenues, New York City, containing a floor area of 1,812,806 square feet. The New York Central, in 1930, constructed its Kingsbridge Warehouse at 230th Street and Kingsbridge Avenue, in the Bronx, New York City, a six-story building containing 300,000 square feet of space; and in 1934 the New York Central constructed its St. John's Park Terminal Building in lower Manhattan on Spring Street between King and Charlton Streets, a three-story building containing approximately 600,000 square feet.

35. The warehouse of the Seaboard Terminal & Refrigeration Company was constructed by that company under a contract with the Erie and two of its subsidiaries under which the latter leased to the Seaboard Terminal & Re-

frigeration Company a plot of ground near the terminal of the Erie in Jersey City, upon which to construct this building. Under the agreement the first four floors of the building, containing 320,000 square feet of space, which are not refrigerated, are leased by the Erie from the Seaboard Company. In the upper six floors, which are refrigerated, the Seaboard Company conducts a general commercial cold storage warehousing operation, of the same nature as that conducted by the private cold storage warehousemen in Jersey City and elsewhere in the Port of New York District, and in competition with them.

36. The Lackawanna leases an indefinite amount of space in the upper floors of its warehouse building in Jersey City to its wholly owned and controlled subsidiary, the Lackawanna Terminal Warehouses, Inc., and in this space the latter conducts a commercial merchandise warehouse business, similar to that conducted by private merchandise warehousemen in the Port of New York District, and in competition with them.

[fol. 556] 37. The Harborside warehouse of the Pennsylvania is in three units, two of which, containing 1,750,000 square feet of floor space, are devoted to general merchandise warehousing, and the third, containing 350,000 square feet of refrigerated space, is devoted to general cold storage warehousing. As originally constructed, the two merchandise units were operated by the Pennsylvania Dock & Warehouse Company and the cold storage unit was operated by the General Cold Storage Company. All three units are now operated by the Harborside Warehouse Company, a wholly owned and controlled subsidiary of the Pennsylvania. These merchandise and cold storage warehousing operations are of a nature similar to, and in competition with, those conducted by the private commercial warehousemen in the New York District.

38. The Lehigh Valley does not itself, nor through its subsidiary, operate a warehouse business in either the Lehigh Bronx Terminal Warehouse or the Starrett-Lehigh Building, but rents the space therein to various tenants who conduct various lines of business, among them being that of warehousing.

39. The New York Central leases 122,400 square feet of space in its Kingsbridge warehouse to the Kingsbridge Auto

Storage & Warehouse Company, and in this leased space the latter conducts an automobile storage and distribution business. The New York Central leases 191,980 square feet of space in its St. John's Park Terminal to the F. C. Linde Company for general warehouse purposes.

40. The B. & O. owns a warehouse building, located at 26th and 11th Avenue, New York City, which it constructed in 1913. It leases space in this building to its subsidiary, the Baltimore & Ohio Stores, Inc., which conducts a general merchandise warehouse business of the same nature as and in competition with private merchandise warehousemen in the Port of New York District.

[fol. 557] 41. The Jersey Central owns a six-story steel and concrete warehouse with basement, located at Lawrence and Mechanic Streets, in Newark, N. J., which it constructed in 1906. Until June 1, 1934, this warehouse was operated by the Newark Warehouse Company, a subsidiary of the railroad. On the latter date the building was leased to the Newark Central Warehouse Company, and in this building that warehouse company is now engaged in the general merchandise warehousing business in competition with other merchandise warehousemen in the Port of New York District.

42. In addition to the above warehousing activities, each of the seven plaintiffs, directly and in its own name, in the capacity of commercial warehousemen, in competition with and solicitation against the private commercial warehousemen in the Port of New York District, is engaged in the warehousing and storage of goods stored under the storage-in-transit privilege.

43. The storage-in-transit privilege, and rules and regulations governing the same, are published in separate tariffs of the plaintiffs which are filed with the Commission. They provide that westbound freight, in carloads, from points within the free lighterage limits of New York Harbor may be stored in designated warehouses (including storage space on piers) within the Port District, and, if reforwarded by rail within the period specified in the tariffs (varying as to different commodities, e. g., crude rubber 30 months, unmanufactured tobacco 36 months, other commodities 12 to 24 months), the through rate in effect on the date of the

shipment, from point of origin in New York Harbor to the final destination, will be applied.

44. Under this storage-in-transit privilege, which finds its principal application upon imported commodities, goods arriving in New York Harbor by vessel are unloaded at [fol. 558] shipside and moved by the rail carrier to the warehouse by lighter, if the warehouse is on the water front, or by lighter thence in switch movement if the warehouse is back from the water front, under a bill of lading issued at the time showing the warehouse where the goods are to be stored as the destination. At the time of this inbound movement to the storage point freight charges are assessed at the local rates specified in the tariffs. If the shipment is forwarded outbound from the warehouse over the line of the inbound carrier and within the time specified in the tariffs (called the transit period) to a point outside of New York Harbor, freight charges are collected on basis of the through rate from shipside to final destination, which through rate in all instances is the same as the rate from the warehouse, and a refund is made of the local inbound freight charges. For example, crude rubber in carload lots, moved by the B. & O. from shipside in New York harbor to a warehouse in the port district for storage, is charged at an inbound local rate of 14 cents per 100 pounds. If subsequently re-shipped over the B. & O. to Akron, Ohio (a typical destination), a rate of 40 cents per 100 pounds is collected, and, since that rate is applicable from the shipside as well as from the warehouse, the local inbound rate of 14 cents is refunded, resulting in the application of a net through rate of 40 cents. If the outbound shipment is made after the expiration of the designated time limit or is forwarded over the line of a carrier other than the inbound rail carrier, the inbound and outbound movements are treated as local shipments and the separate rates to and from the warehouse are applied, resulting, in the case of crude rubber to Akron, Ohio, in rates of 14 cents to the warehouse and 40 cents from the warehouse, or a total of 54 cents.

[fol. 559] 45. These tariff provisions relating to the storage-in-transit privilege govern the application of the carriers' transportation rates; they have no relation to the rates and charges for the warehousing or storage service;

which, as conducted by plaintiffs in the Port of New York District, is commercial and not transportation storage.

46. Large tonnages of various commodities are warehoused and stored by plaintiffs under the westbound storage-in-transit privilege. In 1933, for example, the aggregate tonnages stored by plaintiffs were 152,746 tons of rubber, 33,570 tons of wood pulp, 37,635 tons of coffee, cyanide, sugar, ivory nuts, tin, senna, pepper, tapioca, flour, soap, ground peat, cocoa beans, hemp, paraffin wax, paint, bran, and burlap, and 28,279 tons of various other commodities, or a total of 252,230 tons (504,460,000 pounds).

47. For the warehousing and storage of goods under the transit privilege, plaintiffs use available space in their pier buildings and in the warehouses of their subsidiary warehouse companies, or space rented by them in warehouses of independent companies.

48. The Lehigh Valley uses space in its Claremont Terminal on the water-front in Jersey City, for this storage. Claremont Terminal is one of the more important railroad terminals serving the Port of New York District. Among the facilities there is a 2-story steel and concrete warehouse and pier about 1,000 feet long and 127 feet wide, with a combined capacity of 600 carloads. On July 1, 1935, the Lehigh Valley's westbound storage-in-transit operations were conducted at Claremont Terminal exclusively. At that time it had in storage there, under its westbound storage-in-[fol. 560] transit privilege, 12,404,740 pounds, or more than 6,000 tons, of crude rubber, cocoa beans, and various other commodities.

49. The Erie performs such storage in space (the first four floors) leased by it in the building of the Seaboard Terminal & Refrigeration Company in Jersey City and in the warehouse of the Long Dock Company, a wholly-owned subsidiary, located on the water-front in Jersey City; also on its Weehawken piers and Jersey City piers 8 and 9. As of March 1, 1935, the Erie had on storage in its leased space in the Seaboard Terminal & Refrigeration Company warehouse approximately 17,000,000 pounds of crude rubber, and in the warehouse of the Long Dock Company more than 10,000,000 pounds of crude rubber.

50. The Lackawanna for this purpose uses space in the building of its subsidiary, Lackawanna Terminal Warehouses, Inc., at Jersey City and on its piers 3, 4, 7 and 9 in Hoboken.

51. Prior to July 10, 1930, the B. & O. used space on its piers 5 and 6, St. George, Staten Island, and a portion of municipal pier 12, Stapleton, Staten Island, rented from the city, for such storage. On the date mentioned the B. & O. leased space in the American Dock Stores at Tompkinsville, Staten Island, at a rate of 55 cents per square-foot per annum, for this storage. This lease was made upon the recommendation of the B. & O.'s general traffic manager, in order that such space might be utilized "for commodities that require modern stores because of high insurance premiums resulting from the relative value per cwt.," and to enable the B. & O. to maintain its position among the other lines and to "obtain satisfactory results from a solicitation and traffic producing standpoint." On August 5, 1930, the B. & O. also leased space in the warehouse of Pouch Terminal, Inc., at Clifton, Staten Island, for a similar purpose [fol. 561] and at the same rental. Both leases are flexible so far as space is concerned. During the year 1931 the goods stored by the B. & O. in leased space in American Dock Stores and Pouch Terminal amounted to 37,000 and 24,000 tons, respectively; that stored at piers 5 and 6 amounted to slightly over 8,000 tons, and at pier 12 approximately 1,500 tons.

52. The Pennsylvania for this purpose uses space on its Greenville pier at Jersey City, a covered single-deck pier, 210 feet wide and 1,002 feet long, and on its two-story piers K and L, Jersey City.

53. The New York Central for this purpose uses space in its Rossiter Stores, a six-story warehouse building on 59th Street near the Hudson River, New York City, and on its Weehawken and other piers.

54. The Jersey Central uses space in its Jersey City piers 5, 11, and 14 for such storage. These are single-deck covered piers of steel and concrete construction.

55. All of these railroad piers and warehouses are designated in the tariffs as places where the storage-in-transit

privilege is allowed. In addition, a large number of non-railroad, private warehouses located within the Port of New York District are so designated, including, e. g., Campbell's Stores, Hoboken, N. J., American Dock Terminal and Pouch Stores, Staten Island, Lehigh Warehouse & Transportation Co. and Newark Central Warehouse Co., Newark, N. J., Union Terminal Cold Storage Co., Jersey City, N. J., Terminal Warehouse Co., Merchants Refrigerating Co., and Manhattan Refrigerating Co., New York City.

[fol. 562] 56. The storage rates of each of the several plaintiffs, in effect for several years prior to June 1, 1933, on commodities stored by them under the storage-in-transit privilege, were as follows:

	For first 30 days or less	For each succeeding 15 days or fraction
	cents	cents
Freight in barrels of 400 pounds or less, per bar- rel	4½*	2½
Freight in bags or sacks of 105 pounds or less, per bag or sack	1	½**
Other freight in packages or pieces, per 100 pounds	1½	½

* Erie Railroad, 5 cents per barrel on other than sugar.

** New York Central, 7/16 cent per bag or sack.

57. These storage rates, published in tariffs filed with the Commission, were applicable to all commodities except wood pulp. The tariffs provided that storage of that commodity would be performed free of charges for the first 15 days, and that thereafter the storage rate would be 15 cents per ton for the next 30 days or less, and 5 cents per ton for each succeeding period of 10 days or less.

58. The above-mentioned storage rates did not include labor charges for handling into and out of storage. For such handling the charges were as follows, and these charges included both the in and out handling:

Freight in barrels of 400 pounds or less	3.5 cents per barrel
Freight in bags or sacks of 105 pounds or less—or sack	$\frac{7}{8}$ cent per bag
Other freight, in packages or pieces—pounds	1 cent per 100

[fol. 563] 59. Effective June 1, 1933, after the first hearing before the Commission and the issuance of the examiners' proposed report, the plaintiffs revised their storage rates on commodities stored with them under the storage-in-transit privilege. These revised rates, shown below, applicable on all commodities except crude rubber and wood pulp, were increases and unlike those which they superseded, included handling into and out of storage.

Cents per
100 pounds

On articles taking a carload minimum weight according to the Official Classification of 24,000 pounds or higher:

For the first 30 days or fraction thereof ..	5
For each succeeding 15 days or fraction thereof	1½

On articles taking a carload minimum weight according to the Official Classification lower than 24,000 pounds:

For the first 30 days or fraction thereof ..	8
For each succeeding 15 days or fraction thereof	3

60. Although crude rubber and wood pulp aggregated approximately 75 per cent of the total tonnage stored by them under the westbound storage-in-transit privilege, plaintiffs did not increase the storage rates on those commodities, and the storage and handling rates shown above, in paragraphs 56 and 58, remain in effect on those commodities.

61. All of the above-mentioned storage rates apply upon goods left in storage in warehouse facilities of plaintiffs after the expiration of the above-mentioned time limits of the storage-in-transit privilege. In other words, plaintiffs' storage rates are the same after as before the expiration of the time limit.

[fol. 564] 62. Prior to October 16, 1934, plaintiffs' tariffs permitted the removal of commodities stored under the above storage rates at any time, in any quantity, and by any means of transportation, without additional charge. Effective October 16, 1934, a charge of 5 cents per 100 pounds in addition to the accrued storage charges was made to apply on commodities withdrawn from carriers' storage facilities for movement by means other than over the railroad which granted the storage.

63. Despite the fact that the storage of large quantities of certain of the commodities stored under the transit privilege was shown in the Commission's first report to be a burdensome expense upon them, the plaintiffs, after the first Commission hearing, adopted the practice of extending the expiration date, thereby allowing the goods to remain in storage subject to the transit privilege for longer periods than previously permitted.

64. The cost of handling varies in the case of individual plaintiffs and the total handling cost depends largely on the location of the facilities used for storage. In some cases those facilities are located directly on the water-front, which permits the commodities to be unloaded directly from the vessels or lighters. In such cases one extra handling cost to the carrier, when the goods are handled for outbound shipment, is incurred over the amount that would be incurred if the commodity were loaded directly into cars for shipment. In other cases, and this is true of a large portion of the traffic, the commodities are unloaded from vessels or lighters into cars which are then switched at additional expense to warehouses located away from the water-front, unloaded into the warehouses, and upon removal from the latter are loaded into cars for shipment. In such cases the goods [fol. 565] must be handled three times from the time they are unloaded from the vessel until they are ready for final shipment, and two of these handlings are necessary because of the fact that the goods are stored under the in-transit arrangement. The cost of the two extra handlings is borne by the carrier and not by the shipper, although it is to the latter's commercial interest to avail himself of the storage facilities.

65. The Lackawanna's subsidiary warehouse company performs for it all handling of goods stored by and in its name at its Jersey City warehouse, including loading and

unloading of cars, trucking to and from various locations in the warehouse, piling, transferring, loading into trucks and reloading. On June 1, 1931, the matter was made the subject of contract under which the carrier pays the warehouse company 58 cents per ton for each handling. As two handlings are necessary it costs the carrier \$1.16 per ton to place the goods in storage and reload them into a car. Under its published tariff it charges the shipper 20 cents per ton for handling crude rubber and wood pulp into and out of storage, and, since it pays the warehouse company \$1.16 per ton for the two handlings, it incurs a loss of 96 cents per ton.

66. All handling of freight at the Lackawanna's Hoboken and Jersey City piers is done by contract labor. On freight handled at covered piers the rate paid by the Lackawanna is 35.9 cents per ton and since its tariff charge is 20 cents per ton on crude rubber and wood pulp the carrier incurs a loss of 15.9 cents per ton on each handling of these commodities.

67. The average cost to the Jersey Central of handling freight at its Jersey City piers 11 and 14 is 42.8 cents per ton and for necessary double handling 85.6 cents per ton. Its tariff rate for handling crude rubber and wood pulp, as previously shown, is 20 cents per ton.

[fol. 566] 68. The Lehigh Valley employs a stevedore to perform all handling at its Claremont terminal and pays him 34.5 cents per ton for handling westbound in-transit freight, including crude rubber and wood pulp, as compared with its charge to the shippers for this service of 20 cents per ton.

69. All handling of freight stored by the Pennsylvania at its Greenville pier and piers K and L at Jersey City is done by contract labor at the rate, since March 1, 1932, of 40 cents per ton, or double the Pennsylvania's published handling charge on crude rubber and wood pulp.

70. Early in 1934, shortly after the issuance of the Commission's first report, plaintiff's jointly attempted to determine the cost of storing and handling the commodities stored during the year 1933. Each plaintiff compiled figures showing the cost including interest, maintenance, taxes, insurance, watchmen, overhead, light, power, and incidental items on the portion of the various warehouse facilities used by it for storage. The 1933 ledger value of the structures was used. No allowance was made for depreciation, and other

items which, if proper accounting methods were used, should have been included, were omitted.

71. An exhibit compiled from that cost study shows the cost of storing and handling numerous commodities during 1933. The average cost to all plaintiffs for a total of 37,635 tons consisting of coffee, cyanide, sugar, ivory, nuts, tin, senna, pepper, tapioca, flour, soap, ground peat, palmistie, cocoa beans, hemp, paraffin wax, paint, bran, and burlap was 71 cents per ton per month. The cost for storing 28,279 tons of other commodities not specifically named, was \$1.1226 per ton per month. The average cost of handling per ton [fol. 567] was 44 cents, making the total cost of storing and one handling \$1.15 for the commodities specifically named above, and \$1.5626 for those not named. On goods removed within 30 days the total cost for storage and two handlings would be \$1.59 for the commodities named and \$2.0026 for those not named.

72. Practically all of the commodities last referred to fall within the classification carload minimum of 24,000 pounds or higher, and on such commodities the published rate for storage and handling is \$1.20 per ton, which is 39 cents per ton and 80.28 cents per ton, respectively, less than the above-shown costs to the plaintiffs.

73. The length of time the commodities remain in storage affects the cost to the plaintiffs. If they remain in storage longer than 30 days the cost to the carrier for the second month would be 71 cents; while the shipper would pay the storage rate of only 60 cents. So far as the storage alone is concerned, the monthly loss incurred by the carriage would continue indefinitely so long as the goods remained in storage.

74. During the year 1933 the 7 plaintiffs stored, among the commodities stored under the westbound storage-in-transit privilege, an aggregate of 305,492,000 pounds (152,746 tons) of crude rubber. The average cost incurred by them for such storage (exclusive of handling into and out of the warehouse) was 50.46 cents per ton per month. The average cost of each handling was 44 cents per ton. Thus, when rubber was stored for one 30-day period, the average cost to the plaintiffs was 50.46 cents per ton for storage, 44 cents per ton for handling in, and 44 cents per ton for handling out, or a total of \$1.3846. Their tariff charge for stor-

age of crude rubber for one month (i. e., the first month) was 30 cents per ton and for each handling 20 cents per ton, or an aggregate charge of 70 cents per ton for handling in, storing for one month, and handling out, which resulted in [fol. 568] a loss of 68.46 cents for each ton of rubber so handled and stored. For the second 30-day period and each succeeding 30-day period that the rubber was stored, the average cost per ton to plaintiffs for storing was 50.46 cents, and the tariff charge was 20 cents, resulting in a loss of 30.46 cents per ton.

75. The average cost per month of storing 33,570 tons of wood pulp during the year 1933 was 55.7 cents per ton and the average handling cost was 44 cents per ton. The tariff charge for storage of this commodity for each 30-day period after the 15-day free period, was 15 cents per ton, and the tariff charge for loading and unloading to and from cars was 20 cents per ton.

76. The cost to the Lehigh Valley of storing and handling crude rubber at its Claremont Terminal, when the storage period is 20 months, without taking into account any depreciation on the building, exceeds the entire amount of revenue which the Lehigh Valley receives as its division for transporting the rubber from shipside to the end of its line at Buffalo, N. Y. In other words, on crude rubber unloaded from vessels and stored at Claremont for 20 months, reloaded, and hauled to Buffalo, the actual monetary loss for the storage and handling is greater than the division received by the Lehigh Valley for the transportation of the goods.

77. Heavy losses were incurred by the B. & O. during the year 1931 in connection with storage and handling at the warehouses of the American Dock and Pouch Terminals, as shown in Appendices II and III of the Commission's first report. During that year the B. & O. used an average of approximately 200,000 square feet at American Dock Stores for storage under the transit privilege, which at 55 [fol. 569] cents per square foot amounted to \$110,000. The total income received by the B. & O. for 1931 from its storage operations in this leased space was \$54,480. The total costs for the year were \$146,554, and the result was a net loss to the carrier of \$92,073, equivalent to an average loss of \$2.48 per ton stored.

78. Similar data for Pouch Stores for the year 1931 show that B. & O. revenue from transit storage operations at this facility was \$30,280, that operating expenses were \$84,137, and that the total loss was \$53,857, or an average of \$2.26 per ton stored.

79. Similar losses to the B. & O. continued in subsequent periods. At present the total cost to the B. & O. in connection with traffic handled by it into the American Dock and Pouch Terminal Stores, stored for one year, and handled out, amounts to \$7.06 per ton. The revenue collected by the B. & O. for such service, including inbound lighterage, amounts to \$2.53 per ton, resulting in a loss of \$4.53 per ton. Such loss is absorbed by the B. & O. out of its rates for the line-haul transportation of the rubber, such rate, being, to Akron, Ohio, as a typical destination, 40 cents per 100 pounds or \$8.00 per ton.

80. An exhibit of record, introduced by a witness for the B. & O., shows the net revenue per ton received on rubber transported by it during the period from July, 1930, to April, 1935, and shows that on 148,129 tons of rubber not placed in storage but moved directly from shipside to destination, the B. & O.'s division of the total revenue was \$5.29 per ton, and that it had left from its division received on 107,823 tons of rubber stored in New York \$2.84 per ton. The difference between these figures, \$2.45, represents the loss to the B. & O. from storing and handling goods, or expressed differently, cost incurred in performing commercial service on the rubber.

[fol. 570] 81. In Appendix III of the Commission's first report it was found that the loss suffered by the Erie on westbound in-transit freight stored in space leased by it in the Seaboard Terminal & Refrigeration Co. warehouse in Jersey City amounted to \$6.18 per ton during the year 1931. At the time of the further hearing before the Commission the Erie's space in this building was used principally for the storage of such freight, and on the 17,000,000 pounds of crude rubber stored in this space on March 31, 1935, losses similar to that referred to above resulted to the Erie.

82. The loss to the Erie for the year 1931 from storage of goods under the storage-in-transit privilege in the building of the Long Dock Company in Jersey City (now known

as Dock No. 2 Warehouse) averaged \$2.79 per ton, without considering a return on the value of the land on which the building is located. The Erie concedes that at present the charges for similar storage are no more compensatory than they were in 1931.

83. Although published in tariff form, the carrier warehousing rates are not open to all shippers alike. By the terms of the tariffs themselves, arrangements for the storage must be made in advance. This provision in the tariffs gives the carriers the opportunity of according the storage service at the below-cost rates to some shippers and denying it to others, and in practical operation the benefit is obtained by a relatively few large shippers. In this connection the Commission found "that certain carrier-controlled warehousing facilities are not available to the general public, but only to selected concerns controlling large volumes of traffic. The tariffs provide that arrangements for storage space for westbound shipments in or on [fol. 571] railroad piers or warehouses must be made in advance with respondents, or with outside warehouses if stored therein."

84. About 50 per cent of the crude rubber imported through the Port of New York consists of so-called "licensed rubber," sold on the rubber exchange, none of which is stored in railroad-owned or controlled warehouses. Of the remaining 50 per cent, a considerable amount does not go into storage at New York, but is shipped directly from shipside to destination. The portion stored in plaintiffs' warehouses is owned either by manufacturers or by rubber dealers and brokers.

85. The plaintiffs' tariffs naming rates for the commercial storage of so-called westbound in-transit freight, stored under plaintiffs' liability not as common carriers but as warehousemen, provided that such storage rates did not include insurance and that insurance "must be provided by owners of freight at their expense."

86. Some of the buildings used by plaintiffs for this storage, particularly the piers, are so located and constructed that only a very high insurance rate can be obtained on goods stored therein, the insurance rate on goods stored on pier C of the Pennsylvania at Jersey City, for example, being \$1.905 per \$100 of declared value per annum, while

at other modern and fireproof warehouses owned or controlled by plaintiffs a very low rate is obtained, in some cases as low as 6 cents per \$100 of declared value per annum, this rate applying, for example, at the Lackawanna's new warehouse in Jersey City.

87. At a meeting of the freight traffic managers of the seven plaintiffs on January 29, 1930, this question of insurance was considered and an agreement was there [fol. 572] reached by six of the plaintiffs that they would equalize the insurance rate upon all goods stored by them under the storage-in-transit privilege and shortly thereafter an equalized rate, namely, 8 cents per \$100 of declared value per annum, became effective through publication in the tariffs of each of these six plaintiffs. The Jersey Central did not agree to the equalized rate and did not publish same.

.88. Each of these tariffs provides that upon specific request of owner or party entitled to make such request, the railroad company, "in respect to such property held by it on storage and under responsibility of warehouseman, . . . will, as such warehouseman, assume for account of whom it may concern and regardless of negligence of this company, liability for actual loss or damage by fire to such property in an amount not exceeding the declared value thereof and not exceeding, in case of partial loss or damage, such proportion of the actual loss or damage as the declared value of the property bears to the actual value," and that "the charge for the assumption of such liability will be at the annual rate of 8 cents per one hundred dollars of declared value, the rate for shorter periods to be in accordance with the Underwriters Standard Short Rate Table." These provisions were published in the same tariffs that named the rates for the storage and handling. Prior to the publication of these tariffs under which these common carriers entered the insurance field the insurance was placed by the owner of the freight, necessarily with insurance companies, at the prevailing underwriters' rates.

89. Prior to September 6, 1930, the insurance rate on goods stored on B. & O. piers 5 and 6, St. George, Staten Island, was \$1.73 per \$100 of value per annum. In view [fol. 573] of the more favorable terms enjoyed at some of

the warehouses of competing carriers, the B. & O. adopted the 8-cent rate effective September 6, 1930.

90. To protect its liability as insurer in connection with property so stored in its Staten Island piers, the B. & O. carries six policies with regular insurance companies totaling \$500,000 coverage, and pays a uniform premium of 50 cents per year per \$100 of value. Additional coverage of \$100,000 obtained by the B. & O. at rates from 8 cents to about 15 cents per \$100 of value applies to crude rubber stored by it in its rented space at American Dock Stores and the Pouch Terminal on Staten Island.

91. During the year 1931 the B. & O., on the basis of the 8-cent rate, collected \$793.52 from the owners of goods for insurance, and to cover this liability it paid out to insurance companies during the year \$2,861.07, thereby suffering a loss of \$2,067.55.

92. The Lackawanna covers its liability on property so stored on its piers in Jersey City by reinsuring in regular insurance companies and pays a premium of 35 cents per \$100 of value per annum. The insurance rate on property warehoused by it in space retained by it in the warehouse of its subsidiary Lackawanna Terminal Warehouses, Inc., in Jersey City, is 6 cents per \$100 of value.

93. The Lehigh Valley does not protect its liability under insurance granted by it under said 8-cent rate but assumes the risk itself. So far it has not had to pay any losses. As of June 1, 1935, it had in storage over \$1,000,000 worth of property.

[fol. 574] 94. The New York Central does not reinsure but itself assumes the risk of loss. In June 1931 it paid a claim of \$5,382 for damage by fire on 10,000 bags of stored sugar.

95. The Pennsylvania found on numerous occasions that, because of its high insurance rates on goods stored with it under the storage-in-transit privilege, it was unable to compete with the other trunk-line carriers for westbound storage-in-transit freight. Although its traffic officials recognized that "one of the principal reasons the carriers are erecting these expensive modern facilities is to attract business," and realized that the insurance rates at the modern up-to-date water-front facilities of the Pennsyl-

vania, Erie, Delaware, Lackawanna & Western and other New York lines, for storage of transit freight, were much lower than could be obtained at other carrier facilities where the fire hazard was greater, and expressed doubt as to the legality of a uniform insurance rate to meet the competition of the lines with the more modern facilities, and strongly recommended that a uniform insurance rate be opposed by the Pennsylvania, nevertheless the Pennsylvania later became a party to the 8-cent rate in order to meet competition.

96. The Pennsylvania itself assumes the risk of loss. The standard rates of insurance companies on goods stored in space on its Jersey City piers, per \$100 of value, are 27.7 cents at Pier K, \$1.58 at Pier L, \$1.68 at Greenville piers, and \$1.905 at Pier C. The difference between the rate it charges for insurance, 8 cents per \$100, and these standard insurance rates, applied to a carload of rubber weighing 40,000 pounds, of the value of 17 cents per pound or a total of \$6,800, is \$13.39 per carload stored on Pier K, \$92 per carload stored on Pier L, \$108.80 per carload stored on Greenville piers, and \$124.10 per carload stored on Pier C, per annum.

[fol. 575] 97. The insurance rate on goods stored in space on the first four floors of the warehouse of the Seaboard Terminal & Refrigeration Co., which space is leased by the Erie Railroad Company, is 6 cents per \$100 of value. On other facilities where goods insured by the Erie are stored, the rate of insurance companies is considerably higher than the insurance rate of 8 cents charged by the Erie, but it is not shown whether the Erie assumes the risk of loss or reinsures.

98. The Jersey Central has never been a party to the arrangement agreed to by the other plaintiffs under which they grant insurance at an equalized, uniform rate, and has at no time itself issued such insurance, nor published an insurance rate of 8 cents per \$100 of value, the reason given being that on account of its short hauls, its rails extending westward only to Scranton, Pa., it receives only a small revenue or division, and cannot afford to assume any losses in connection with insurance. At its piers 11 and 14, Jersey City, in which it uses space for storage of goods granted the storage-in-transit privilege, its insurance rate is \$1.29 per

\$100 of value, and it has refused to lower this rate to meet the rate of 8 cents per \$100 of value made by the other plaintiffs.

99. After the issuance of the Commission's first report, the plaintiff carriers, through a committee, gave consideration to the subject of insurance, and that committee reported to the plaintiffs' executives that "as a competitive matter it is necessary that the insurance rates in the warehouses of all railroads be substantially the same," and that the rate of 8 cents per \$100 of value "is much below the rates ordinarily prevailing for such insurance, and in instances where the carriers reinsure they are compelled to pay a higher rate and bear the difference." The Commission found in its second report that no reason for such insurance practices appeared, except the competitive feature above mentioned.

100. The Commission found and concluded that crude rubber, wood pulp and other commodities are stored by plaintiffs under arrangements which are not bona fide transit arrangements necessarily related to the transportation services which it is the duty of the plaintiff carriers to perform; that the services and practices of plaintiffs in connection with this storage are a part of the business necessary in conducting a commercial warehouse enterprise, and that such storage is not incidental to the transportation which plaintiffs are obligated by law to perform, but is commercial storage, and while the Commission did not condemn bona fide transit arrangements, it did condemn, as violative of the Interstate Commerce Act, the practices disclosed "by which the carriers, through stress of competition, have assumed by tariff publication a part of the costs of strictly commercial storage and handling of goods."

101. In respect of the so-called storage-in-transit and services incidental thereto the Commission made the above and other findings of fact, as set forth in its reports, and, further, made the following summary of principal findings of fact with respect to these matters:

"1. Each of the seven class I respondent carriers considered herein provides by tariff publication for storage, handling, and with the exception of the Jersey Central, for insurance, of carload freight in warehouses, buildings, or

piers owned or controlled by it or by companies with which it is affiliated.

"2. The storage, handling, and insurance arrangements provided under respondents' tariffs, considered in the discussion [fol. 577] herein in connection with the storage of eastbound and westbound carload freight and insurance, are not services incidental to transportation, but are commercial services. Similar commercial services are performed by competing warehouse companies in the Port of New York district, which are not owned or controlled by, or affiliated with, respondents.

"3. The tariffs providing said services are a part of a scheme devised to purchase competitive traffic, and through said tariffs the respondents hold themselves out to perform or furnish commercial services under the guise of transportation services.

"4. The said tariffs are instruments which work violations of the Act * * *

"5. The respondents deal in and furnish commercial storage, handling, and insurance of goods at rates and charges which do not reimburse them for the full cost of providing such services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods in their owned, controlled, or affiliated warehouse buildings or piers.

"6. The respondents do not assume or bear any part of the cost of conducting the commercial operations of competing shippers who store goods in warehouses operated by said competing warehouse companies."

102. Upon these findings and upon other facts as found in its reports, the Commission found and concluded, in respect of the so-called storage-in-transit and services incidental thereto, as follows:

[fol. 578] "We find that, exclusive of storage and handling directly incident to immediate transportation or immediate delivery of goods, the storage, handling, and insurance of goods under tariff arrangements in warehouses or piers owned or controlled by, or affiliated with, respondent carriers, as described of record and discussed herein, are commercial services provided to certain shippers in interstate

commerce at rates and charges which fail to compensate said respondents for the cost thereof.

"We further find that the provision by respondents of said commercial storage, handling, and insurance at such noncompensatory rates and charges reduces below the published tariff rates the transportation charges paid by certain shippers in interstate commerce, whose goods are so stored, handled and insured, and results in concessions to said shippers to the extent of the difference between the cost to said respondents of providing such storage, handling, and insurance, and the amount which they receive therefor.

"We further find that through such storage, handling, and insurance arrangements, and by granting such concessions, the respondent carriers are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said act, and depart from their published tariffs, in violation of section 6 of said act.

"We are not to be understood as here condemning bona fide stoppage and storage in transit as permitted generally by carriers throughout the country, for the purpose of milling, manufacturing, or similarly trade processing the commodities stopped or stored.

[fol. 579] "We affirm our prior findings that the respondents' warehousing and storage practices, charges assessed therefor, allowances made in connection therewith, and the insurance of goods as hereinbefore described in the Port of New York district, dissipate respondents' funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest."

103. A large tonnage of flour is received by rail at the Port of New York and is there held for distribution throughout the thickly populated surrounding sections. Storage of such flour is therefore a commercial necessity, and a large reserve supply must be at all times available. Flour is desirable traffic from the plaintiffs' standpoint, and there is intense competition between them for its transportation. Under these circumstances the dealers and persons interested in the handling of flour have been, and are, able to secure concessions for storage which reduce and in some

cases nullify their cost for that trade necessity, and the plaintiffs have willingly or unwillingly assumed the burden of the storage expense.

104. Such assumption has been brought about largely through the leasing of space in railroad-owned or controlled warehouses, which permits the lessees, who are dealers in flour or are otherwise interested in its distribution, to avoid payment of plaintiffs' published tariff charges for storage in their premises, applicable upon eastbound traffic. These storage charges, which are greatly in excess of plaintiffs' charges for the storage of so-called westbound in-transit freight, are, for each 5-day period or fraction thereof beyond the free time, as follows: First 6 periods (including handling in and out) 1 cent per 100 pounds; next 6 periods 1.5 cents per 100 pounds; succeeding periods, 2 cents per 100 pounds, or, stated otherwise, 6 cents per 100 pounds [fol. 580] for the first month, 9 cents per 100 pounds for the second month, and 12 cents per 100 pounds for the third and succeeding months.

105. Plaintiffs' leases to flour distributors provide for low monthly rental on a square foot basis. The Pennsylvania leases to the International Milling Company 5,000 square feet of space on the in-shore end of the second floor of its Jersey City pier K, for the storage of export and domestic flour, at a rental of 2 cents per square foot per month.

106. The Lehigh Valley occupies Pier 44, East River, under lease from the City of New York. This is a 2-story pier, and is used almost exclusively for the storage and distribution of flour. The lower floor is used by the carrier to store freight during the free time period and the upper floor is rented to flour-distributing concerns at a rate of 36 cents per square foot per annum. Similar leases of space are also made by the Lehigh Valley to flour truckers and dealers at its piers in Jersey City—Piers B, C, D, G and I—at a rental of 2 cents per square foot per month. Dealers in and distributors of flour avoid tariff storage charges (i. e., the eastbound storage charges shown above) by availing themselves of these leasing arrangements.

107. Space leased to flour distributors is in many cases not separated from the remaining space in the warehouse where goods are stored under tariff rates but is designated

only by painted lines on the warehouse floor, and it has been the practice in many instances to permit lessees of space for flour storage to use without charge additional space adjacent to that leased. In its second report, the Commission, after stating it was claimed by the Lehigh Valley that it had or would correct these practices, found that "shippers who are permitted to occupy space without payment [fol. 581] therefor are granted concessions or offsets from the published transportation charges."

108. The expense of unloading the flour from the cars and placing it in the leased space on the Lehigh Valley's Jersey City piers and of reloading it when it is distributed from such space is borne by the Lehigh Valley.

109. But when the flour transported by the Lehigh Valley to Jersey City is unloaded and stored in private warehouse space and reloaded for distribution, the Lehigh Valley bears none of the expense of unloading and reloading. The only reason given for the difference in treatment as between shippers who store at the Lehigh Valley piers and those who store in private warehouses was that it has long been the custom of the Lehigh Valley to stand the handling expenses when flour is stored on its piers.

110. The Lehigh Valley also bears the expense of unloading the flour and placing it in the space leased to flour distributors on its Pier 44, East River. On flour which arrives and is stored at the Lehigh Valley piers in Jersey City and is reloaded and moved to Lehigh Valley East River Pier 44 and there unloaded and placed in leased space, three handlings are necessary, and the expense thereof is borne by the Lehigh Valley under its tariff provisions.

111. In some cases excessive allowances are paid to lessees for the handling of flour. The Lehigh Valley pays the Postman Flour Trucking Company 55 cents per ton for handling flour from car to storage, at Pier 44, East River. The amount paid by the New York Central to the lessee of space in its warehouse at Port Morris or on its piers was 60 cents for unloading. These rates are much higher than the usual stevedoring rate paid to contractors who handle all types of merchandise. The rates paid to contractors for [fol. 582] general handling seldom exceed 46 cents and in a few instances are as low as 35 cents per ton.

112. The Pennsylvania would not meet the competition of the other plaintiffs in making allowances to lessees and contractors for unloading flour at its pier terminals, and as a consequence was unable to secure any considerable portion of the domestic flour traffic. Its tariff provided for the handling of the flour to or from the leased space by employees of the Pennsylvania, any additional labor to be performed by and at the expense of the owner of the property. While certain of the trunk lines had similar tariff provisions, they apparently permitted the lessees or truckmen to do the unloading and paid allowances therefor.

113. Through existing arrangements the plaintiffs have provided flour storage space at less than cost.

114. Through the practice of plaintiffs in leasing their storage facilities to trucking or stevedoring companies it is possible for flour merchants in New York City to avoid bearing any such expense for storage. Under such circumstances the operators of commercial warehouses are unable to compete successfully for the business of storing flour.

115. After the first hearing before the Commission, the leasing of space and arrangements for handling flour had the consideration of various committees of plaintiffs. The New York Central canceled its arrangements whereby stevedoring and handling of flour were performed for it by other than its own employees. That carrier recommended to one of the committees that in order to correct the practices with respect to leasing, as criticised in the Commission's first report, all leases should be canceled, and in the latter part of 1933 this plaintiff canceled its own leases, and [fol. 583] although it rescinded this action shortly thereafter, the record of the rehearing before the Commission indicates that the New York Central did actually cancel its leases effective July 31, 1935. The plaintiffs' general committee seems to have recognized that many of the practices in connection with flour storage were indefensible and recommended that such leases be canceled as to parties interested only in the trucking and handling or similar services. This recommendation was defeated by the opposition of the Lehigh Valley. It was testified on behalf of the Lehigh Valley that it had no intention of canceling such leases.

116. Illustrative of practices which have grown out of the leasing of space to flour dealers is a condition disclosed in connection with the lease to the United Flour Trucking Corporation by the New York Central at its Port Morris station (on the East River at 149th St.). The space at Port Morris available for lease, while considerable in amount, was insufficient to permit the flour handled by the United Flour Trucking Corporation to be unloaded and stored promptly upon receipt at the station. The result was that the flour was held in cars until space was available for unloading. Inasmuch as the New York Central tariff provided that it would unload such freight into available facilities, the cars were held at the so-called "convenience" of the carrier, and no demurrage on the cars was paid. Through this device the lessee-consignees received unlimited use of railroad cars free of charge, while the carrier at the same time bore either the cost of ownership of its own cars or per diem cost of cars owned by other carriers. On June 19, 1935, 57 cars of flour were so held, and the average time of their detention was 15.2 days. While de-[fol. 584] tailed testimony with respect to this practice relates only to the New York Central, the evidence shows that it was typical of such leasing arrangements throughout the Port of New York District. In such instances the effect of such leasing of space for the storage of flour nullifies the application of tariffs providing for collection of demurrage on cars held by shippers or consignees.

117. Upon adequate evidence showing the above facts, as set out in its reports, the Commission found "that the leasing of space to shippers for storage of the particular description of traffic here involved, which results in such shippers paying a lower storage rate than that charged other shippers for space identical in all respects, constitutes a device whereby respondents engage in unjustly discriminatory and unduly preferential practices forbidden by sections 2 and 3 of the Act. The space here discussed is leased from respondents and used for storage which is a necessary and component part of the commercial activities in connection with the handling and distribution of flour. This storage is not a part of transportation as defined in the Act. . . . Respondents by paying for or assuming the cost of such commercial service, depart from their pub-

lished transportation rates and charges in violation of section 6 of the Act.

118. In the proceeding before the Commission the protesting warehousemen presented a detailed formula purporting to show the rate per annum necessary to secure a fair return per square foot of warehouse space in the Port of New York District. This formula differentiates between available space and net space which can be occupied by the goods stored. It shows 44 cents per square foot per annum [fol. 585] as a necessary rate for available space and 88 cents per square foot for net or occupiable space (based upon "present day" costs of construction, 6 per cent interest on investment, 2 per cent depreciation, and on occupancy, which long experience of warehousemen throughout the country has shown to be the average, of $66\frac{2}{3}$ per cent). Both amounts are equivalent to $71\frac{1}{3}$ cents per square foot per month. The Commission, while unable to say that these figures are conclusive, pointed out that though they were questioned by plaintiffs' counsel as to the methods and calculations used, no attempt was made to disprove by other testimony the results arrived at, and found that there were wide variations from the amount determined by the formula to be a proper rental basis.

119. The Baltimore & Ohio leases pier 21, East River, a two-story covered pier, known as the East River Stores, from the City of New York, at an annual rental of \$49,833.63. It subleases the second floor of this pier containing 37,000 square feet of gross space to its subsidiary, the B. & O. Stores. The latter in turn subleases 4,000 square feet of this space to tenants at an annual rental of 60 cents per square foot. In the space not subleased, the B. & O. Stores conducts a general warehousing business similar to that conducted by it at the Twenty-Sixth Street Stores, and performs all incidental services ordinarily performed by public warehousemen. Formerly, as much as \$10,000 a year was paid by the Stores Company to the B. & O. for rental of this space, but since July 1, 1928, it has paid no rental whatsoever. In lieu of rent the Stores Company turns over to the B. & O. its profits, if any, derived from its operations.

120. The B. & O. Stores was organized by the B. & O. on January 2, 1914. Title and ownership of the 26th Street

warehouse rests with the carrier. All the stock of the [fol. 586] B. & O. Stores is held by the B. & O. except directors' qualifying shares. All officials of the B. & O. Stores are also officers of the B. & O., except its treasurer and manager.

121. The 26th Street Stores is reached exclusively by the rails of the B. & O., and it maintains team tracks adjacent to the warehouse building, the first floor of which it uses as a freight station. It uses a portion of the second floor for office purposes. It leases to the B. & O. Stores the basement, office space on the second floor, and all floors above the second, aggregating 199,000 square feet of space. Of this, the B. & O. Stores subleases 68,000 square feet to other tenants at annual rates ranging from 40 to 72 cents per square foot.

122. With few exceptions, freight taken into storage by B. & O. Stores has been restricted to that on which the B. & O. would get the line haul. Evidence of record shows clearly that the warehouse has been operated for the purpose of securing traffic to move via the B. & O., and that its patrons have been those who receive, or propose to ship, freight over the carrier's lines. The evidence also indicates that the Traffic Department of the B. & O. was continually pressing the B. & O. Stores to reduce its storage rates for traffic reasons, and in numerous cases it appears that such rates were actually dictated by that department. At East River Stores, goods were apparently taken into storage at what could be obtained for the service; in other words, "the rates not being based on anything but what would get the business." The manager of the B. & O. Stores on numerous occasions called the attention of officials of the B. & O. to the losses that were being incurred in the operation of storage facilities, and to the performance of services free, or at rates below the cost thereof, upon demands of traffic officials in order to meet the competition of other carriers.

[fol. 587] 123. The rental paid by the Stores Company for space in the 26th Street building has varied from year to year. In 1930, \$96,000 was paid, and in 1931, \$87,000. In 1932, the amount agreed upon was \$84,000, but this amount was not paid. Instead, the Stores Company turned over

to the B. & O. the amount it earned from operations on basis of free rent, amounting to \$42,838, resulting in a loss to the B. & O. of \$41,162, the difference between the agreed rental and the rental it received. In 1933 the rent was fixed at \$43,000, in anticipation of the amount which the Stores Company would be able to pay, and resulted in the Stores Company's operations showing a "profit" of \$4,070, which was also turned over to the B. & O. Similar rental arrangements were made in 1934, the "profit" for that year, amounting to \$5,713, also being turned over to the B. & O.

124. The total cost to the B. & O. of the 26th Street building, including the cost of the land on which the building stands and adjoining land occupied by the team tracks, was \$1,640,472.39. Of the latter amount \$812,876.60 is shown as the cost of the land occupied by, and for that portion of, the building devoted to warehousing. A return of 6 per cent on the latter amount, that is that portion of the amount invested by the B. & O. in the 26th Street building allocated to warehousing, would yield \$48,772. Taxes for the year 1934 were \$18,048. The record does not indicate the amount taken into account for depreciation.

125. For a number of years after its incorporation in 1914, the practices of the B. & O. Stores, while conducted with a view to attracting traffic to the B. & O., did not differ materially from the practices of warehouse operators in general in the Port of New York District. As then conducted they seem to have resulted in some profit, and there [fol. 588] are grounds for belief that the operations would have remained profitable had those practices been continued. However, upon the entrance of other New York railroads (plaintiffs) into the commercial warehousing field in the Port of New York District on a much larger scale than those of the B. & O. Stores, competition for commercial warehousing business became increasingly bitter. After that time the Traffic Department of the B. & O. dominated the management of the Stores Company. Evidence of record shows the struggle of the management of the Stores Company to continue to operate the warehouse at rates which would permit it to carry its own burden, but the desire of the Traffic Department to secure business for the B. & O. resulted in forcing the warehouse rates and charges to unprofitable levels, leaving the B. & O. to assume the burden of the warehouse operations. The evidence further

shows that the Stores Company's warehouse revenues were shrunk by competitive price cutting. The operations became unprofitable and in numerous cases accounts for storage and leased space were taken at rates below the cost of the services.

126. The record establishes beyond question that the B. & O.'s Traffic Department dictated many rates which, when applied by the Stores Company, resulted in the rental of space for storage of goods at prices which, while they obtained line-haul business for the B. & O., were less than the cost of providing the space or services. In other words, the shipper in those instances obtained a concession in storage which affected and reduced the total cost for transportation and storage of the commodities shipped. The B. & O., by bearing the losses of the Stores Company, provides the concession, which consists of the difference between the transportation rate plus the real value of the storage or use of the rented space and the rate at which these are actually furnished.

[fol. 589] 127. Upon adequate evidence showing the above facts and other facts as set out in its reports, the Commission made the following findings of fact in regard to the warehousing practices of the B. & O. insofar as they are carried out through its subsidiary the Baltimore & Ohio Stores, Inc.:

"The Baltimore & Ohio Stores, Incorporated, is a wholly owned and controlled subsidiary of the Baltimore & Ohio. The stores company is an adjunct of the railroad's traffic department, and is in effect a part of the railroad.

"The Baltimore & Ohio, through the stores company, engages in the commercial warehousing business in competition with other commercial warehouses in the Port of New York district.

"The Baltimore & Ohio, through the stores company, provides storage for and leases space to certain shippers in interstate commerce at rates and charges which fail to compensate said railroad for its cost in providing said storage and space, thereby assuming a part of the cost of conducting such shippers' commercial operations.

"The Baltimore & Ohio does not bear any portion of the expense of conducting commercial operations for other shippers for whom it transports freight in interstate commerce,

and who store goods and lease space in warehouses which compete with the Stores company's warehouse."

128. Upon these and other findings as made in its reports, the Commission found and concluded that "by assuming a part of the costs of conducting the commercial operations of certain shippers in interstate commerce, and by providing storage and warehouse space at noncompensatory rates and charges for said shippers, the Baltimore & Ohio reduces below the published tariff rates the transportation charges paid by said shippers, and grants concessions [fol. 590] to said shippers to the extent of the difference between the cost to said railroad of providing said storage and space and the amount which it receives therefor"; and further that "by assuming a part of such costs and by granting such concessions the Baltimore & Ohio is guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages in violation of section 3 of said act, and departs from its published tariff rates, in violation of section 6 of said act."

129. The Lackawanna's warehouse, near the water-front in Jersey City, is located upon and is served exclusively by its own line. Evidence of record shows that the construction of this warehouse is a railroad venture, designed to compete with the other trunk lines, and to attract traffic to the line of the Lackawanna in competition with the other trunk lines.

130. The building is 848 feet long by 163 feet wide, with 8 stories and a basement. Space on the first and second floors is used by the Lackawanna as a freight station, and the remainder of the building is used for warehouse purposes. Sidetracks connecting with the Lackawanna, on the second floor level, accommodate 52 cars at one time. On the first floor there are four tracks with a working capacity of 70 cars.

131. The cost of the building and freight terminal facilities was \$9,199,062.09, of which \$5,035,275.05 was allocated to the portion of the building used for warehousing.

132. Under the terms of a lease and agreement as between the Lackawanna and the Lackawanna Terminal Warehouses, Inc., herein called the warehouse company, an

indefinite amount of space is leased to the warehouse company. The lease provides that the amount of space to be occupied by the lessee will vary from day to day and that [fol. 591] the lessee will pay rent only for the average number of square feet of space actually occupied each month. For the space so occupied the warehouse company pays an annual rental of 22.368 cents per square foot of gross space.

133. The space not occupied by the warehouse company is used by the Lackawanna for storage of goods stored with it under the storage-in-transit privilege.

134. The warehouse company was incorporated July 10, 1929. All of its capital stock is owned by the Lackawanna, which also furnished the working capital. The Lackawanna's purpose in constructing the warehouse was to attract traffic to its line in competition with the other trunk lines. The incorporation of the warehouse company was in furtherance of that purpose and devised in an attempt to evade certain regulations to which the Lackawanna as a common carrier by rail was and is subject. Certain officers of the Lackawanna hold like positions with the warehouse company, and certain other officers who were formerly employed by the Lackawanna now constitute the management of the warehouse company. So far as concerns all important matters in connection with the warehouse the manager thereof is subordinate in authority to a warehouse committee composed of five executives of the Lackawanna. The interest of the Lackawanna in the warehouse company extends to a complete domination and control thereof. The warehouse company is an adjunct of the Lackawanna's traffic department.

135. The warehouse company employs a force of solicitors, and distributes considerable advertising matter. The traffic department of the Lackawanna is also active in the solicitation of freight to be handled through the warehouse. Solicitation of traffic is an important expense involved in [fol. 592] commercial warehouse operation, and the Lackawanna through solicitation by its many offices and agents of business for the warehouse company assumes a large part of that expense.

136. The area of the building devoted to warehouse operations is 1,072,883 square feet. For the 35 months from

December 1931 to October 1934, inclusive, the average amount of space used by the Lackawanna in the warehouse was 645,940 square feet, and the average amount of space used by the warehouse company, including all space necessary for aisles, columns, etc., was 426,943 square feet. The Lackawanna thus occupied 60.21 per cent of the space and the warehouse company 39.79 per cent. The warehouse company during this period paid an average monthly rental of \$7,959.

137. From April 1, 1930 (the date of the opening of the warehouse) to September 30, 1934 (approximately $4\frac{1}{2}$ years), the loss, i.e., the excess of interest on investment and depreciation over operating income, to the Lackawanna on the portion of the building devoted to warehousing, with interest computed at 5 per cent and depreciation at 2 per cent, was \$1,391,170.67. The loss to the warehouse company from its operations during the same period was \$106,000.

138. The warehouse company holds itself out to perform three classes of service, namely, the renting or leasing of space, general storage, and the handling of pool cars. Under the arrangement of renting or leasing of space the lessee takes over the required amount of space necessary in which to maintain his office and stock, places his own employees in charge and operates identically in the same manner as he does his own shipping room at the plant or factory, except that the warehouse company provides all handling [fol. 593] outside of the leased space, including the unloading of cars, deliveries into the tenant's space and removal of assembled outbound shipments from the space to the railroad or motor trucks. The warehouse company assesses a separate charge for such handling in addition to the rental charge for leased space.

139. A compensatory annual rate including a reasonable profit for the net space subleased by the warehouse company would be 60 cents per square foot. The warehouse company holds itself out as willing to lease space at rates from 40 to 50 cents per square foot, but in numerous cases space is rented at much lower rates. At the time of the second Commission hearing (July 1935) there were about 30 tenants occupying space in the warehouse at rentals ranging from 25 to 60 cents per square foot per year. In

1929 the manager of the warehouse company was advised by the Lackawanna that, based on what the warehouse earnings should be, a rate of 60 cents per square foot per year should be charged. In 1930 after finding it impossible to secure tenants at this figure, the warehouse manager was authorized to lower the rate to 50 cents. As practically no tenants were secured, further reduction was authorized. Extreme variations in rentals charged on a square foot basis are shown of record, due it was testified, to competition with private warehouses and other railroads, and to the real estate market. The reason for the higher existing rentals is that they were made on long term leases in 1930. In some cases free rent is granted for a period of time at the beginning of the lease term, depending entirely on the desirability of the tenant from a landlord's standpoint, the availability of space, and the amount of traffic which will be diverted to or retained by the Lackawanna.

[fol. 594] 140. Numerous leases were made in the early part of 1934 to parties interested in the handling and sale of liquor at annual rentals ranging from 25 cents to 40 cents per square foot. To some extent the rates were governed by the amount of space occupied. In one instance a rate of 25 cents was made in order to meet the competition of another warehouse which had offered to handle the liquor to and from storage without charge. Variable arrangements and charges for handling of goods to and from the leased space were entered into. While it was testified by the warehouse manager that the handling charges are in all cases compensatory, it is clear that reductions are made in such handling charges below a compensatory level in order to obtain business which otherwise might be lost.

141. The warehouse company leased to the Kraft-Phenix Cheese Corporation, effective April 1, 1934, 91,831 square feet of space in its warehouse at an annual rental charge of \$27,350, equivalent to 29.94 cents per square foot. Prior to this lease the Kraft Company occupied space leased by the Erie from the Seaboard Terminal & Refrigeration Company at its Jersey City warehouse, at the rate of 32 cents per square foot per annum. About September 1933, when the Kraft Company's lease from the Erie was about to expire, traffic officials of the Lackawanna, viewing the desirability of the Kraft Company's traffic, which was estimated to be about 4,725 cars annually, although it actually

amounted to about one-half that figure, undertook to interest the Kraft Company in changing its location from the Seaboard Company's warehouse to the warehouse located on the Lackawanna. The Lackawanna warehouse did not have refrigeration facilities necessary in the operations of the Kraft Company, and extensive alterations were required [fol. 595] to make the space suitable. The warehouse company agreed to install and operate the necessary refrigeration equipment, adjust the space to suit the Kraft Company, and make such changes in the walls and such further improvements as would be necessary at the expense of the Kraft Company, except that the warehouse company agreed to contribute \$15,000 toward the cost thereof. The Lackawanna actually expended \$25,548.52 in making the improvements and alterations, which amount was later charged to the additions and betterments account of the Lackawanna, and the warehouse company paid its contribution of \$15,000 to the Kraft Company by waiving the rentals for nearly six months beginning with the effective date of the lease. The net return to the warehouse company under the lease, after payments by it for the operation of the refrigeration equipment and other expenses incident to the lease, was considerably lower than the receipts from the lease at 29.94 cents per square foot.

142. Upon adequate evidence showing the above and other facts regarding the Lackawanna lease of space to the Kraft Company and the previous lease by the Erie Railroad Company to the Kraft Company, the Commission found and concluded: "The Kraft Company through its control of a large volume of traffic, has, since January 1929, been able at all times to obtain space for its operations at rates which are wholly noncompensatory to the railroads' warehouse companies. The granting of concessions by carriers through the leasing of space at rentals less than its fair value is as unlawful as any other form of rebate."

143. The Commission further found that this Kraft lease is illustrative of "the willingness of the various respondents [fol. 596] to grant concessions in the leasing of space to shippers in interstate commerce who control a large volume of traffic."

144. The second class of service which the warehouse company performs is general storage. This type of business is placed by the owner with the warehouse company as custo-

dian. The warehouse company stores the material and performs all labor at a charge per package or per hundred-weight. The owner places all orders for reshipment or may supply the warehouse with a credit list showing the names of their customers who are permitted to order direct from stock. The warehouse company maintains all stock records, selects the materials required, issues shipping papers, marks packages and keeps all inventory and stock reports. The warehouse company performs a distributing and warehouse service and all the incidental services required on this class of service. When necessary it collects charges on c. o. d. shipments, and when shipments received for storage are consigned to the warehouse and billed collect, it pays the Lackawanna the freight charges within the credit period, and later collects from the shipper or consignee. Ordinarily the warehouse company bills the shipper or consignee for the freight charges, and they are paid in the regular course of business. In some instances they are included in the monthly bills rendered for warehouse services, but in specific cases shown of record, the warehouse company has been unable to collect for periods of several months. In such cases, due to the close relationship between the warehouse company and the railroad, this amounts to a failure on the part of the Lackawanna to collect its freight charges within the usual 96-hour period allowed for such collection.

[fol. 597] 145. In 1929 and 1930, the rate of the warehouse company for general storage on a square-foot basis was 75 cents annually for space occupied. Because of the keen competition this rate was reduced in the latter part of 1930 to 60 cents and in 1932 to 48 cents. Thereafter the rates of the warehouse company were governed by "what the other fellow did." In some instances they were lowered to about 36 cents. Some accounts which had been originally placed in general storage at rates which were compensatory were forced because of competition to noncompensatory levels. In one case a competing warehouse cut rates from 33 to 40 per cent below the rates of the Lackawanna warehouse and the latter was compelled to meet such rates in order to retain the business. In some instances goods were stored at a monthly charge per 100 pounds, and corresponding reductions were made in the charges on that class of business. The manager of the warehouse company testified that 48 cents per annum per square foot is a com-

pensatory rate but that this will not allow any profit. On the basis of that figure it is clear that concessions to shippers are made in the leasing of space and the storage and handling of goods. It is likewise clear that many of the arrangements between the warehouse company and the Lackawanna, on the one hand, and persons whose goods occupy the storage space, on the other, are entered into as a result of bargaining and concessions. The Commission found that "such bargaining and concessions, whether made by the Lackawanna directly, or indirectly through its subsidiary warehouse company, violate sections 2, 3 and 6 of the Act."

[fol. 598] 146. The third class of business which the warehouse company performs is the handling of pool cars. Storage of goods handled in pool cars is seldom required. Under this arrangement the shipper consolidates a sufficient number of consignments for various customers and destinations to insure a carload minimum and consigns them to the warehouse company for immediate reforwarding to final destination. Under this arrangement, a concern using either less-than-carload freight or forwarding company service may, in many instances, save the difference between the rate being paid and the lower carload rate, which saving is sufficient in many instances to pay the cost of warehouse and delivery charges to destination, in addition to facilitating the time in transit between the factory and the customer's door. By Rule 23 of the Consolidated Freight Classification, to which the Lackawanna is a party, a carrier may not distribute carloads of freight in less-than-carload lots, nor assemble less-than-carload lots into carloads. Acting through the instrumentality of its subsidiary warehouse company, the Lackawanna thus indirectly performs services in connection with pool cars which it may not perform directly, and thus departs from the provisions of its tariff, viz., Rule 23 of the Consolidated Freight Classification.

147. Upon the evidence before it the Commission made the above and the following findings of fact in regard to the warehousing practices of the Lackawanna acting through its subsidiary warehouse company:

"Lackawanna Terminal Warehouses, Incorporated, is a wholly owned and controlled subsidiary of the Lackawanna. The railroad dominates and controls the warehouse com-

pany and uses it as an adjunct of its traffic department. The warehouse company is in effect a part of the railroad:

[fol. 599] "The Lackawanna, through its said wholly owned subsidiary warehouse company, engages in the commercial warehouse business in competition with other commercial warehouses in the Port of New York district.

"The Lackawanna, through its said wholly owned subsidiary warehouse company, leases and rents warehouse space to shippers in interstate commerce at rates and charges which fail to compensate said railroad for its costs in providing said space.

"The Lackawanna, through its said wholly owned subsidiary warehouse company, provides free rental of warehouse space for varying periods of time to certain shippers in interstate commerce. The amount of free rental so provides is dependent upon the bargain made between said shippers and said railroad.

"The Lackawanna, through its said wholly owned subsidiary warehouse company, handles goods into and out of storage for certain shippers in interstate commerce at less than said railroad's cost of such handling.

"The Lackawanna, through its said wholly owned subsidiary warehouse company, performs commercial storage of goods in its warehouse for certain shippers in interstate commerce at rates and charges which are less than the cost of providing said storage.

"The Lackawanna, through its said wholly owned subsidiary warehouse company, distributes in less-than-carload lots shipments transported at carload rates in interstate commerce.

"The Lackawanna, through the instrumentality of its said wholly owned subsidiary warehouse company, delivers to certain shippers freight transported in interstate commerce, without collecting freight charges on said freight until after the expiration of 96 hours after delivery of the freight.

[fol. 600] "The Lackawanna, through the practices described in connection with the leasing of space, provision of free rental, commercial storage and handling of goods, distribution of carload freight in less-than-carload lots, and failure to collect freight charges within 96 hours after delivery of the freight, assumes a part of the cost of conduct-

ing the commercial operations of certain shippers in interstate commerce over its line.

"The Lackawanna does not bear any portion of the expense of conducting commercial operations for other shippers for whom it transports freight in interstate commerce, and who store goods and lease space in warehouses which compete with its wholly owned subsidiary warehouse company."

148. Upon these findings and upon other facts as found in its reports, the Commission found and concluded that "by assuming part of the cost of conducting the commercial operations of certain shippers in interstate commerce, by providing commercial storage, services incident thereto, and warehouse space at noncompensatory rates and charges, and by following other practices described herein the Lackawanna reduces below the published tariff rates the transportation charges paid by said shippers, and grants other unlawful concessions to said shippers"; and further that "by assuming a part of such costs, and by granting such concessions, the Lackawanna is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages in violation of section 3 of said act, and departs from its published tariff rates in violation of section 6 of said act."

[fol. 601] 149. The Lackawanna leases from the City of New York Pier 41, North River, including the adjoining bulkheads and land under water. The pier and adjoining bulkheads have an area of 89,485 square feet. Prior to May 1, 1932, the annual rental for these facilities was \$44,401.25 or 16.8 cents per square foot for the total area of 265,142 square feet. On that date the rental was increased to \$99,675, or 37.6 cents per square foot per annum. The Lackawanna receives from the North German Lloyd Steamship Company, which occupies an adjoining pier, \$20,000 per annum for partial use of the water rights. In 1930 the Lackawanna began negotiations to rent space on this pier to the Quaker Oats Company in an effort to draw that company's traffic, which at that time was moving over the Jersey Central, to its line. The Lackawanna offered 10,000 square feet on the outshore end of the pier for an annual rental of \$2,700 or 27 cents per square foot, which was accepted August 1, 1930. Alterations were made by the

Lackawanna which cost \$5,877.21, which is more than the rental for two years. The Oats Company's lease is terminable upon 30 days' notice. The Commission found that this lease is an example of securing competitive traffic by means of a noncompensatory rental. This lease, at a noncompensatory rental, has continued without change to the present time. In its second report the Commission found that "The Lackawanna leases space on Pier 41, North River, New York City, to the Quaker Oats Company at rates and charges which failed to compensate said railroad for its cost in providing such space."

150. The Lehigh Bronx Terminal Warehouse was constructed at a total cost of \$1,419,631.83, of which \$128,779.97 was for land and \$1,290,851.86 was for the warehouse. The [tel. 602] warehouse, which was opened for operation May 15, 1929, is owned by the Pioneer Real Estate Company, all of the stock of which is held by the Lehigh Valley, and the directors and officers of the real estate company are also officers and directors of the railroad. The Lehigh Valley is thus the sole owner and operator of this warehouse. Intensive traffic solicitation is conducted by the Lehigh Valley's traffic and other departments to obtain business for tenants who occupy space in these buildings in order that the Lehigh Valley may benefit by the movement of traffic over its line. On July 1, 1935, 67.7 per cent of the space in the building was leased. The rental rates for permanent leases ranged from 27 to 53 cents per square foot per year. One of the tenants, the Lehigh Harlem River Terminal & Warehouse Company, conducts a public warehouse business in the building, consisting of the storage and distribution of automobiles. Various reductions in rent have been made by the Lehigh Valley to this warehouse company because its business had not been profitable. It has occupied considerable space in the building for which it has been charged no rent. As of March 31, 1935, it was delinquent in its rental in the amount of \$15,402.49. Another tenant, the American Bread Wrapper Company, was \$9,121.20 in arrears and other tenants were in arrears from amounts ranging from \$78.85 to \$700. According to the books of the Lehigh Valley the net income from operation of the Bronx Lehigh Building for the year ended December 31, 1933, was \$31,910.20; 1934, \$33,743.71; and for the first four months of 1935, \$8,925.36, but in computing these fig-

ures no amounts were included as expenses for depreciation or interest on the investment.

[fol. 603] 151. The supervision and management of the Starrett-Lehigh Building is in all respects identical to that of the Bronx-Lehigh Building, and the operations of the two buildings are conducted in the same manner. Traffic solicitation is conducted by the Lehigh Valley for tenants of both buildings. On June 22, 1932, the Pioneer Real Estate Company was forced to take over the Starrett-Lehigh property by assuming a mortgage of \$4,500,000. After this was done the Pioneer Company's investment, including the cost of the improvements, interest, and taxes in arrears, amounted to \$6,649,000. It was necessary to subordinate the Bronx-Lehigh Building to the mortgage, and also to take out additional insurance on the latter building in the amount of \$100,000.

152. The Lehigh Valley occupies the lower floor of the Starrett-Lehigh Building, which it uses as a team-track yard. For this space it pays the Pioneer Company a rental of \$50,000 per year. One tenant in the building, the Midtown Warehouse Company, conducts a general warehousing business and occupies more than 100,000 feet of space. Most of the goods stored by this tenant move by rail, although some are handled by truck. On June 30, 1935, there were 90 tenants in the building, occupying 1,052,781 square feet of space, which is 58.07 per cent of the total floor area. Rentals made at various rates are governed somewhat by location in the building. The rental rates are based on competitive conditions and are stated to be as high as the traffic will bear. In order to obtain tenants it was necessary to offset the rentals such tenants were obligated to pay at former locations. In most cases deals are made in obtaining tenants, and the rental rate which the tenant is able to obtain depends largely upon his skill as a negotiator. Extensive alterations are necessary in many cases to fit [fol. 604] the space to be occupied to suit the particular business in which the tenant engages. In many instances free rent is granted for a period of time at the beginning of the lease term for various periods ranging up to a year. The operation of the Starrett-Lehigh Building resulted in a loss of \$304,000 in 1933, and \$200,000 in 1934. These losses do not include any item for depreciation, although it was admitted that such an item should properly have been

included, 2 per cent being admitted a reasonable figure. As of March 31, 1935, a large number of tenants in this building were in arrears in their rents for various amounts, the total being \$126,000. In many cases leniency is shown in the collection of rentals, on the ground it would serve no good purpose to crowd the tenants into receivership. A large percentage of the tenants are shippers of traffic over the Lehigh Valley. It was the original intent that the operation of the Starrett-Lehigh and the Bronx-Lehigh buildings would attract traffic to the Lehigh Valley, and the intention is carried out at present.

153. Upon the evidence before it the Commission made the above and the following findings of fact in regard to the warehousing practices of the plaintiff Lehigh Valley acting through its subsidiary:

"The Pioneer Real Estate Company is a wholly owned and controlled subsidiary of the Lehigh Valley. The railroad dominates and controls the real-estate subsidiary and the latter is in effect a part of the railroad.

"The Lehigh Valley, through its said wholly owned subsidiary, owns and operates buildings described of record as the Bronx Lehigh Building and the Starrett Lehigh Building, and engages in renting space in said buildings to certain shippers in interstate commerce for storage, warehousing, and manufacturing purposes at rates which fail to compensate said railroad for the cost of providing said space.

"The Lehigh Valley, through its said wholly owned subsidiary, permits certain tenants, shippers in interstate commerce, to occupy space in said buildings for substantial periods of time, without collecting from said shippers the amount of rental due under the leases.

"The Lehigh Valley, through its said wholly owned subsidiary, permits certain shippers in interstate commerce to occupy space in said buildings under rental arrangements which are arrived at by bargaining between officials of the railroad company, or its wholly owned subsidiary, and said shippers without regard to rental charges to other shippers for like space.

"The Lehigh Valley, through its said wholly owned subsidiary, makes alterations and improvements in said buildings without charge to certain shippers in interstate commerce. These expenditures, which affect the cost to the

Lehigh Valley and the value of the space to the shippers, further reduce the net compensation derived by the Lehigh Valley under said leases.

"The Lehigh Valley, through its said wholly owned subsidiary, permits certain shippers in interstate commerce to occupy space in the Starrett Lehigh Building without charge, for varying periods of time at the beginning of the term of lease.

"The Lehigh Valley, through the practices described in connection with the leasing of space, failure to collect rentals, making alterations and improvements for certain shippers at its own expense, and permitting free occupancy of space by certain shippers assumes a part of the cost of conducting commercial operations of certain shippers in interstate commerce over its line.

[fol. 606] "The Lehigh Valley does not bear any portion of the expense of conducting the commercial operations of other shippers for whom it transports freight in interstate commerce, and who lease space in warehouses which compete with its said wholly owned subsidiary."

154. Upon these findings and upon other facts as found in its reports, the Commission found and concluded that "by assuming a part of the costs of conducting commercial operations of certain shippers in interstate commerce, by leasing storage, warehousing, and manufacturing space at noncompensatory rentals, and by following other practices described herein, the Lehigh Valley grants unlawful concessions to said shippers, and reduces below its published tariff rates the transportation charges paid by said shippers"; and that "by assuming a part of such costs, and by granting such concessions the Lehigh Valley is guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages, in violation of section 3 of said act, and departs from its published tariff rates, in violation of section 6 of said act."

155. The Newark warehouse of the Jersey Central was constructed in 1906 by the Newark Warehouse Company, all the outstanding capital stock of which is held by the Jersey Central. The principal officers of the warehouse company are also officials of the Jersey Central. The warehouse company constructed the building with funds advanced by the Jersey Central to secure which the warehouse

company in 1910 issued a bond for \$1,394,710.95 in favor of the Jersey Central. This bond has been reduced from time to time by the warehouse company and now amounts to \$1,110,000. The building is 350 feet long and 175 feet wide, [fol. 607] with a total commercial warehouse space of about 250,000 square feet. The building is served by Jersey Central sidetracks on the south side of the first floor. On June 1, 1934, the Newark Warehouse Company leased the building to the Newark Central Warehouse Company for a two-year period. The lessor agreed to make certain repairs and alterations, to keep the railroad tracks within the building in good order, and to pay all taxes on the property. The lease provides for an annual rental of \$5,000 plus 40 per cent of the first \$10,000 in earnings, 60 per cent of the second \$10,000, 75 per cent of the third \$10,000, 80 per cent of such earnings between \$30,000 and \$110,000, and 60 per cent of the earnings in excess of \$110,000. The lessee was given the privilege of renewing the lease after the two-year period had expired, under the following conditions: The rental in addition to \$5,000 for the second year and each year thereafter up to 12 years from the date of the lease shall be \$40,000, or the amount of the taxes paid by the lessor, whichever is the greater. In other words, the lessor would receive the additional rental only in the event that the lessee's operations during the first two years made it appear that it would be profitable for it to continue in business. Otherwise the warehouse could be turned back to the lessor, and the lessee would be bound to pay only \$5,000 for each of the two years plus a percentage of the profits if any were made. Under the lease arrangement the amount of rental paid by the lessee, based on the business which it had done during the first year of its occupancy, was \$17,217, slightly less than one-half of the taxes on the building for that period. During that time the lessor expended \$38,560 in repairs on the building, and the depreciation thereon amounted to approximately \$21,500.

[fol. 608] 156. The warehouse was constructed and financed by the Jersey Central as a medium through which traffic would be attracted to its line. Traffic solicitation and advertising for the warehouse company emanate from the freight traffic department of the Jersey Central. The warehouse is an adjunct of the railroad's traffic department, and the latter has made continuous and intensive efforts to solicit

traffic over its line for storage in the warehouse. Although the Newark Warehouse Company is a corporate entity, it is, and at all times since its incorporation has been, a subsidiary of the Jersey Central and responsive to its direction and control. The Jersey Central provides warehousing facilities for the Newark Central Warehouse Company at rentals which are wholly noncompensatory. The Newark Central Warehouse Company engages in a general warehouse business and performs any or all services necessary in conducting that business. In many instances it has dominion for transportation purposes as consignee or consignor over goods shipped in interstate commerce and stored by it. It engages in whatever branch of the general warehousing business it considers profitable, including the handling of cars containing shipments for two or more consignees, and occasionally handles the equivalent of pool cars. In some cases the warehouse company pays the freight charges to the railroad and later collects from the owners of the goods. The Commission found that "Through this leasing arrangement, the Jersey Central, through its subsidiary warehouse company, subsidizes the Central Warehouse Company and places it, a 'person' within the meaning of that word as used in sections 2 and 3 of the act, in a position of superiority over other persons engaging in the warehouse business and thus permits it to underbid such other competing persons for storage of shipments transported in interstate commerce."

[fol. 609] 157. Upon adequate evidence the Commission made the above and the following findings of fact in regard to the leasing arrangement as between the Jersey Central and the Newark Central Warehouse Company:

"The Newark Warehouse Company is a wholly owned and controlled subsidiary of the Jersey Central. The railroad dominates and controls the warehouse company and uses it as an adjunct of its traffic department. The warehouse company is in effect a part of the railroad.

"The Jersey Central, through its said wholly owned subsidiary, permits the occupancy, by the Newark Central Warehouse Company, of the warehouse of its wholly owned subsidiary at Newark, N. J., described of record, under leasing arrangements which fail to compensate said railroad for its cost in providing space in said warehouse.

"The Newark Central Warehouse Company is a shipper in interstate commerce, and stores goods for shippers in interstate commerce in competition with certain other warehouse companies who are also shippers in interstate commerce and who store goods for other shippers in interstate commerce over the Jersey Central in the Port of New York district. The Jersey Central, through leasing arrangements with the Newark Central Warehouse Company, as described of record, bears directly a portion of the expense of commercial operations of the latter company, and indirectly a portion of the expense of commercial operations of the shippers who store goods with the latter company. The Jersey Central does not bear any portion of the expense of commercial operations of the competing warehouse companies or of shippers who store goods with such warehouse companies."

[fol. 610] 158. Upon these findings and upon other facts as found in its reports, the Commission found and concluded that "by means of the leasing arrangements described of record, the Jersey Central reduces below the published tariff rates the transportation charges on interstate shipments handled or stored by the Newark Central Warehouse Company, and thereby the Jersey Central grants concessions on such interstate shipments to the extent of the difference between the cost to said railroad of providing said space and the amount which it receives for the occupancy thereof"; and further that "through such leasing arrangements and by granting such concessions, the Jersey Central is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the Newark Central Warehouse Company and to shippers who store goods therewith, and subjects competing warehouse companies and shippers who store with such warehouse companies to undue and unreasonable prejudice and disadvantage in violation of section 3 of said act, and departs from its published tariff rates in violation of section 6 of said act."

159. The lease by the New York Central to the Kingsbridge Auto Storage & Warehouse Company (herein called the Auto Storage Co.) of space in the Kingsbridge Warehouse was originally entered into on October 1, 1929, for a

term of 10 years, at an annual rental of \$30,600, equivalent to 25 cents per square foot for the 122,400 square feet covered by the lease. Shortly thereafter the New York Central fireproofed this space so as to permit the "live" storage of automobiles therein by the Auto Storage Co. (such live storage permitting the automobile to be fully serviced ready for driving), and, by supplemental lease effective March 1, 1930, the annual rental of the space was increased to \$40,392, equivalent to 33 cents per square foot. This lease is still in effect.

160. The cost to the New York Central of the Kingsbridge Warehouse including the land was \$1,395,895. The need for this building from the standpoint of retaining and securing carload automobile traffic was explained to the President of the New York Central by a vice president in a letter of January 21, 1929, in which, speaking of the competitive situation, he referred to activities of the Lehigh Valley, Erie and Lackawanna in solicitation of automobile traffic and their construction of unloading tracks and platforms and a large warehouse, and expressed the conclusion that it was necessary, "in order to protect the traffic we are now enjoying and to be in a position to obtain additional traffic to provide adequate unloading facilities and warehouse storage [fol. 612] at Kingsbridge." The letter also pointed out that rental of 144,000 square feet of space in the first unit of the warehouse at 25 cents per square foot would yield \$36,000 yearly as rental, whereas \$49,000 rental was necessary to obtain full return on the investment in the warehouse building alone (estimated as \$600,000 for the one unit then under contemplation), and allow for amortization of the building and for maintenance, taxes and insurance.

161. The actual loss to the New York Central for the year 1931 arising from its ownership and leasing of the Kingsbridge Warehouse including interest on the investment, was \$109,381.40.

162. Automobiles are shipped over the New York Central to the Auto Storage Co. at the Kingsbridge Warehouse in carload lots. These are either stored and later delivered in single units or delivered direct without storage to local dealers or as directed by these dealers.

163. The New York Central also owns a warehouse located at West 59th Street and 12th Avenue, extending to

West 60th Street and West End Avenue, New York City, known as the "Old Sheep House". This warehouse, which contains 167,062 square feet, is leased by the New York Central to the Jay-A. Mellish Warehouse Company, Inc., which is closely affiliated with the Auto Storage Co. The Mellish Company uses this warehouse for the storage and distribution of automobiles shipped to it over the New York Central. Under the original five-year lease effective January 1, 1925, the rental was \$10,441.38, equivalent to 6¼ cents per square foot per annum. This rental, the Commission found, was "from one-eighth to one-tenth of the usual rental obtained for warehouse space in New York City." The lease was renewed for a five-year period on January 1, 1930, at [fol. 613] the same rental. During the year 1931 the New York Central's loss from this lease, computing interest on the investment at 6 per cent, was \$24,942.61. Upon renewal of the lease, for a five-year period beginning January 1, 1935, the rental was revised. The lessee now pays a minimum rental of \$15,000 per year, plus a percentage of rentals collected by the lessee from its subtenants over and above a certain minimum. (The New York Central also formerly leased to the Mellish Company the first and second floors of its warehouse building known as the Rossiter Stores at a rental of 6.25 cents per square foot of space per annum, but this lease has since been canceled.)

164. Under an agreement between the New York Central and the Auto Storage Company, effective October 1, 1929, and still in effect, the Auto Storage Company unloads all automobiles from cars at the Kingsbridge warehouse and for such unloading the New York Central pays it an allowance of \$1.50 per automobile, averaging about \$5.25 per freight car. The New York Central entered into a similar agreement with the Mellish Company for the unloading of automobiles at the Old Sheep House, and under this agreement, which is also still in effect, the New York Central makes the same allowance to the Mellish Company for the unloading.

165. Under the same agreements, the Auto Storage Company and the Mellish Company stored automobiles for the account of the New York Central. During the year 1931, under this arrangement, the Auto Storage Company stored 2,718 automobiles for the New York Central. The latter collected \$9,779.84 for this storage, on basis of its published

eastbound in-transit storage rates, and paid to the Auto Storage Company for its services, exclusive of handling, \$20,316, resulting in a net loss of \$10,536.16, or \$3.87 for each automobile. This loss was in addition to that of \$109,381.40 [fol. 614] shown above. During the same year the Mellish Company stored 3,240 automobiles for the New York Central and the latter thereby incurred a loss of \$3.50 per automobile or a total loss of \$11,335.13, exclusive of handling charges. This was in addition to the loss of \$24,942.61 for 1931, shown above, resulting from the lease of the warehouse to the Mellish Company. Following the Commission's first report the New York Central discontinued storing freight in outside warehouses or with outside warehouse companies, i. e., warehouses other than those owned by the carrier, and that part of the above-mentioned agreements under which the Auto Storage Company and the Mellish Company stored automobiles for the account of the New York Central has been canceled. The losses to the New York Central resulting from noncompensatory rentals and allowances to the Auto Storage and Mellish Companies have, however, continued.

166. The New York Central, as shown above, expected to incur a loss from the storage operations at Kingsbridge but felt that such loss would be justified by the increased traffic in automobiles over its lines. The prospective loss from the operation of the Kingsbridge warehouse building was intended to be covered out of the line-haul revenue. Such loss could be covered only by an increase in the automobile traffic by 1,200 carloads per annum.

167. The purpose of the New York Central in entering into the arrangements with the Auto Storage Company and Mellish Company was to increase traffic over its lines. The New York Central recognized that losses would thereby result and intended to absorb such losses out of the line-haul revenue on traffic which it hoped would be increased through [fol. 615] traffic solicitations by the Auto Storage and Mellish Companies. The arrangements must therefore, the Commission found, "be construed as a device to purchase traffic through the rental of space at noncompensatory rates, and by the payment of allowances for services which are a part of the commercial activities of the Auto Storage and Mellish Companies. The testimony shows, and it is almost self-evident, that commercial warehousing companies en-

gaged in the storage of automobiles received in carload lots by rail are unable to successfully compete for that business when faced by the competition of the storage companies subsidized by the New York Central."

168. In its first report the Commission found that "Certain of the carriers load and unload carload traffic, or make allowances to cover the cost of such loading and unloading for certain shippers, under tariffs or exceptions to the classification. This is contrary to the general practice with respect to carload traffic and to the provisions of the consolidated freight classification. An illustration of this character is the allowance made by the New York Central to the Auto Storage Company and the Mellish Company for unloading automobiles, including removal of material used in stowing the automobiles in the car. When carriers by their tariffs extend their services beyond their legal obligation as common carriers, as, for example, beyond a delivery equivalent to team track delivery, we have ordinarily found that such extra service must be paid for by the shipper in order to avoid preference and prejudice. [Citing cases.]"

169. The Commission further found that "As pointed out in the prior report, the low rental to the Auto Storage Company and the Mellish Company resulted in heavy losses to the New York Central. The record is conclusive that the [fol. 616] space occupied by those companies is furnished by that respondent at less than the cost to it of providing such space. It is likewise conclusive that the services above described for which allowances are paid, are commercial services not within the New York Central's obligation to perform."

170. Upon the evidence before it the Commission made the above and also the following findings in regard to the leasing arrangements as between The New York Central and the Auto Storage Company and the Mellish Company and the payment of allowances by The New York Central to those companies:

"The New York Central leases warehouse space to the Mellish Company and the Auto Storage Company, shippers in interstate commerce over said railroad's line, at rental charges which fail to compensate said railroad for the cost of providing said space, thereby assuming a portion of the expense of commercial operations of said companies."

"Certain other warehouse companies, likewise shippers in interstate commerce over the New York Central are located in the Port of New York district and are competitors of the Mellish Company and the Auto Storage Company. The New York Central does not bear any portion of the expense of conducting the commercial operations of said competing warehouse companies.

"The New York Central pays allowances to the Mellish Company and the Auto Storage Company for unloading and handling automobiles, which are commercial services not within the obligation of said railroad to perform under its line-haul rates. Allowances therefor constitute concessions from such rates."

[fol. 617] 171. Upon these findings and upon other facts as found in its reports, the Commission found and concluded that "by leasing space at noncompensatory rentals to the Mellish Company and the Auto Storage Company, and by granting allowances for commercial services performed by said companies, the New York Central is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the said warehouse companies in violation of section 3 of said act, and departs from the said railroad's published tariff rates in violation of section 6 of said act."

172. The Harborside warehouse was constructed on land owned by the Pennsylvania Railroad Company, valued at \$1,132,200. On August 20, 1929, the Pennsylvania leased this land to the Pennsylvania Dock & Warehouse Company and it constructed thereon a warehouse and cold storage plant in three units, at a cost for one unit of approximately \$1,780,000 and \$6,756,000 for the other two. The building extends 970 feet on the water front and is 320 feet wide. It is served by seven Pennsylvania sidetracks. Shipments can be handled direct from lighters and steamers, over two piers connecting with and extending out from the warehouse building.

173. The Harborside warehouse was originally planned to attract competitive traffic to the line of the Pennsylvania. No important part of the planning, financing, refinancing, or operation of the building has been conducted except under the direction of the Pennsylvania. The warehouse opera-

tions are part of the Pennsylvania's general railroad operations, and, at the most, the former are separated from the latter only by an imaginary line. The Pennsylvania controlled every important detail in the construction of the [fol. 618] warehouse and contributed \$4,116,000 directly to the project. No rent for the land, valued as shown above at \$1,132,200, or interest on the Pennsylvania's contribution of \$4,116,000 has been paid. Other expenditures were made by the Pennsylvania in furtherance of this warehouse project, namely, \$1,645,000 and \$1,825,000, respectively, for the two piers. The total investment by the Pennsylvania in connection with these piers and warehousing facilities was approximately \$9,000,000.

174. The Pennsylvania Dock & Warehouse Company went into receivership in July 1931. Under a plan of reorganization the Harborside Warehouse Co., Inc., was formed and it purchased all the property and assets of the bankrupt company for \$2,100,000. All the principal officials of the Harborside Co. are likewise officials of the Pennsylvania. The American Contract & Trust Co., a wholly owned subsidiary of the Pennsylvania, acquired the entire capital stock of the Harborside Co. The latter company also purchased all the assets of the General Cold Storage Co. for \$3,500 and the Cold Storage Co. was dissolved in June 1934. As a result of the above transactions, the Pennsylvania, through its subsidiary trust company, now owns the building. A suit has been brought by the Pennsylvania to recover \$5,000,000 from the surety company which guaranteed completion of the building by the bankrupt company.

175. The Harborside warehouse, equipped with a steam plant and an extensive refrigeration plant, is now operated as a commercial warehouse. Considerable space, refrigerated and non-refrigerated, is used for storage operations, which include all of the incidental services necessary in conducting a competitive commercial warehouse business. Such [fol. 619] space is charged for on a square foot basis or in some instances according to the weight of the articles stored. Services such as handling and marking of goods stored, which in most or all cases are owned by shippers in interstate commerce, are charged for on a man-hour basis. Space is also rented on a square foot basis to tenants, most or all of whom are also shippers in interstate com-

merce, whose business interests require them to store, manufacture, blend, pack or perform a similar trade process on the goods handled. During the life of the National Recovery Administration the storage operations of the warehouse were conducted in accordance with the warehousemen's code, and the basis for charges under the code were continued thereafter. While it does not appear that the Harborside Company has indulged in price cutting on storage or space rented to the same extent as other railroad-controlled New York warehouses, it is clear that under some circumstances it engages in practices which offer opportunities to defeat the requirements of the Interstate Commerce Act. Among such practices are alterations made in space rented to shippers in order to fit the needs of the particular warehouse business in which the shipper engages. Free rental for a period of time at the beginning of a lease term is in some cases allowed, the amount of time for which no rent is collected apparently being governed by the desirability of the tenant from a landlord's standpoint. Under these circumstances, the extent of the services performed by the Pennsylvania for its shipper tenants must vary from time to time, and as a result the compensation received by that carrier for a given service likewise varies.

176. The rates charged by the Harborside Company for rented space range from 40 to 70 cents per square foot per annum. It was testified on behalf of the Pennsylvania that [fol. 620] in fixing the rates for storage and rental the out-of-pocket costs were obtained, but it was developed that such costs did not take into account charges for depreciation on the building or on the refrigerating and similar machinery used in conducting the operations. The value of the building is carried on the books of the Harborside Company as \$7,350,000. According to the accounts of that company, its operations for the 7-months' period ended April 30, 1935, resulted in a net income of \$18,800.71, but if depreciation at 2 per cent on the book value of the building had been charged a net loss of \$66,949.29 would have resulted.

177. Upon the evidence before it the Commission made the above and also the following findings of fact in regard to the warehousing practices of the Pennsylvania acting through its subsidiary the Harborside Warehouse Company:

"The Pennsylvania, through a wholly owned subsidiary, owns and controls the Harborside Warehouse Company. No important activity of the Harborside Warehouse Company is conducted except under the domination, or at least the direction, of the Pennsylvania officials.

"The Harborside Warehouse Company is engaged in the commercial-warehouse business. It and other warehouse companies in the Port of New York District compete for the storage of goods transported in interstate commerce by the Pennsylvania.

"The Pennsylvania does not set up as an element of the cost of operation of the Harborside Warehouse Company the depreciation charges on the building it occupies. Depreciation is one of the elements of cost in the operation of a warehouse."

178. On these findings and upon other facts as found in its reports, the Commission found and concluded that "in determining the out-of-pocket costs of providing warehouse [fol. 621] space for shippers in interstate commerce the Pennsylvania must take into account as an item of expense the depreciation on its warehouse buildings and facilities used and owned directly or indirectly by it, and that failure to take into account all proper costs in providing warehouse or storage space for shippers in interstate commerce constitutes a device to provide such space at less than cost, and thus evade the provisions of sections 2, 3, and 6 of the Interstate Commerce Act."

179. In its first report the Commission pointed out that the matters and transactions referred to therein "are further illustrations of serious waste resulting from the competition of railroads with each other for traffic." The extent of this waste is indicated by statements contained in appendices to the report, Appendix I of which shows that the seven plaintiffs expended approximately \$35,000,000 in connection with the warehouse projects considered in the report. In its second report the Commission found that up to the close of the year 1930, the cold storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in the Port of New York District, and that within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000

cubic feet of refrigerated space on the market, notwithstanding the fact that at the time there was an unused capacity of at least 30 per cent of the then-existing facilities; and further that as of the close of the year 1930 the 43 warehouse companies operating merchandise warehouses, other than cold storage, in the Port of New York District had placed 20,450,000 square feet of warehouse space on the market in that district, and that within six years subsequent to January 1, 1929, the plaintiffs or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 per cent. Appendix II of the first report shows that the loss incurred by plaintiffs in connection with their warehouse projects during the year 1931 was \$1,260,441. Appendix III shows that the loss per ton of freight stored in transit during 1931 ranged from \$1.28 to \$6.18. These losses were added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. In this connection the Commission found: "Whether or not initial advantages may have been realized at one time or another, by individual carriers, the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public." And the Commission found "that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest.

Dated, N. Y., March 23, 1938.

Harrie B. Chase, U. S. Circuit Judge. Robert P. Patterson, U. S. D. J. Murray Hulbert, U. S. D. J.

[fol. 623]

CONCLUSIONS OF LAW

1. Upon adequate evidence the Commission found that the plaintiff now do at less than cost all those things which the order prohibits them from doing at non-compensatory rates and charges.

2. The hearings held by the Commission, in which all parties, including plaintiffs herein, were given full opportunity to present evidence and be heard, constituted the full hearing contemplated by section 15 (1) of the Interstate Commerce Act.

3. The Commission's findings, as made in its reports of December 12, 1933, June 8, 1936 and February 2, 1937, are supported by adequate evidence and are sufficient support in law for the order of February 2, 1937.

4. Providing such services as the plaintiffs do provide, and as were found to have been furnished for less than cost, violates the Interstate Commerce Act in that some shippers are given more favorable treatment than others in a like situation.

5. The practices of plaintiffs in performing at less than cost all those things which the order prohibits them from doing at non-compensatory rates and charges, constitute violation of section 6 of the Interstate Commerce Act, in that those persons permitted to receive such below-cost services, in effect, move their goods at less than tariff rates, and receive preferential treatment in violation of section 3 of the Interstate Commerce Act; others, not so favored, are discriminated against in violation of section 2 of said Act.

6. The Commission did not abuse the discretion vested in it by section 16a of the Act in denying plaintiffs' petition for a third hearing, filed after the issuance of the Commission's second report and after two lengthy hearings had been held in which plaintiffs were accorded full opportunity to present any relevant evidence.

7. The order is based on findings supported by the evidence, which show it is within the jurisdiction of the Commission as derived from the Act. By the order requiring plaintiffs to cease and desist from practices found to violate sections 2, 3 and 6 of the Interstate Commerce Act, the Commission exercised the power conferred upon it by section 15 (1) and other provisions of the Act, and in making the order the Commission did not exceed its authority.

8. Bona fide transit arrangements are not affected by the Commission's order; only the commercial practices in which the carriers (plaintiffs) through stress of their competition have assumed a part of the cost of strictly commer-

cial warehousing, storage, handling and insurance of goods, are so condemned; these voluntary practices, undertaken in order to get or keep the business, do violate the Act.

9. Cost, as set forth in the findings and order of the Commission, permits of definite calculation and the plaintiffs can readily comply with the order; we find no real substance to the argument that "cost" is too vague a term upon which to base an order; cost is certainly as definite as the fair value standard for which the plaintiffs contend, and since it can be figured from past actual experience, is much more so. The order is sufficiently certain and definite in terms to enable plaintiffs to comply therewith.

[fol. 625] 10. Although the plaintiffs have covered what is termed "in-transit storage" by published tariffs, and charged uniformly those published rates, it by no means fellows that sections 2 and 3 of the Interstate Commerce Act have not been violated by the practices forbidden by the order.

11. The practices found by the Commission and forbidden by the order, are commercial services and not transportation services required under the Act. The order properly condemns the practices that the plaintiffs have engaged in, storage and warehousing services which are not within their common carrier obligations, and the providing of such services to shippers below the cost thereof, thus reducing the cost to such shippers for the transportation of their goods. The tariffs covering the commercial services, now on file, are instruments which work violations of the Act, in that through them the plaintiffs hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate the plaintiffs for the cost of performing these services, and thereby plaintiffs violate sections 2, 3 and 6 of the Act.

12. These violations of the Act were amply proved and the practices condemned are performed by the plaintiffs for some shippers only, in order to get or keep the business. The condemned services were voluntarily performed by the carriers for some shippers, commercial services at rates and charges which when added together do not return to the plaintiffs their published tariff rates for transportation plus the cost of the commercial services.

[fol. 626] 13. To the extent that such cost is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carriers' loss had been paid. Where the carriers sustain losses in performing voluntary commercial services for shippers as an inducement to them to buy transportation of the carriers at the published tariff rates for the goods as to which such voluntary commercial services are performed, to the extent that the carriers are out-of-pocket because of the performance of such voluntary commercial services furnished the shipper, their published tariff rates for such transportation are lowered or cut.

14. It is required that the published tariff rates for transportation be maintained, applicable alike to all shippers under like circumstances. Here the inducing commercial services which the carriers perform for some shippers to get or to hold their business have the effect, as appears by the evidence and as found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return; the transportation service is performed by the plaintiffs to those shippers for less than to others when the loss deduction results from commercial services performed below cost—whether at market value or not.

15. All carriers subject to the provisions of the Interstate Commerce Act must stand and be treated alike, whether they have made poor investments or not.

16. Charges for commercial services, performed below cost, as considered by the Commission, are readily distinguishable from what are properly transportation services, [fols. 627-628] and their prohibition does not conflict with the principle that reasonable tariff rates need not be sufficient to give railroads a fair return on every transportation service rendered in respect to every part of its property so used.

17. The petition should be dismissed.

Dated March 23, 1938.

Harrie B. Chase, United States Circuit Judge.

Robert P. Patterson, United States District

Judge. Murray Hulbert, United States District

Judge.

[fols. 629-630] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 84402

THE BALTIMORE & OHIO RAILROAD COMPANY et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., Defendants

FINAL DECREE—Filed March 23, 1938

— This cause having come on for final hearing by the special court of three judges, constituted as required by the Act of October 22, 1913 (c. 32, 38 Stat. 219, U. S. C., Tit. 28, sec. 47) and the Court, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined, for the reasons set forth in the opinion heretofore filed by this Court herein that the petition should be dismissed for want of equity at the cost of the plaintiffs, it is

Ordered, Adjudged and Decreed, That the petition be, and the same is hereby dismissed, for want of equity, at plaintiffs' costs.

This 23rd day of March, 1938.

(Sgd.) Harrie B. Chase, United States Circuit Judge.
Robert P. Patterson, United States District Judge.
Murray Hulbert, United States District Judge.

[fol. 631] IN UNITED STATES DISTRICT COURT

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for
Reversal—Filed May 3, 1938

I

PETITION FOR APPEAL

The Baltimore and Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; The New York Central Railroad Company; Erie Railroad Company;

The Pennsylvania Railroad Company, and Lehigh Valley Railroad Company, plaintiffs herein, considering themselves aggrieved by the final order and decree of the specially constituted District Court of the United States for the Southern District of New York, made and entered in this cause on the 23rd day of March, 1938, dismissing plaintiffs' petition and denying to them the relief therein sought, do hereby appeal therefrom to the Supreme Court of the United States, and [fol. 632] pray that their appeal be allowed; that citation be issued as provided by law; that a transcript of the material parts of the record, proceedings and papers on which said final order and decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States under the rules of said Court in such cases made and provided, and that a proper order relating to the security to be required of them be made.

II

ASSIGNMENT OF ERRORS

Your petitioners, plaintiffs herein, in connection with their petition for appeal, present this assignment of errors and say that in the record and proceedings in the above entitled cause and in making and entering therein on March 23, 1938, the final order and decree dismissing plaintiffs' petition said District Court of the United States for the Southern District of New York erred in the following respects:

1. In denying the petition herein of plaintiffs for a permanent injunction restraining the operation and enforcement of the order of the Interstate Commerce Commission, dated February 2, 1937, described in the petition.

2. In holding that plaintiffs are not entitled to relief in accordance with the prayers of the petition.

3. In holding that the findings made by the Interstate Commerce Commission and described in said petition are sufficient in law to support said order of February 2, 1937.

[fol. 633] 4. In holding that the findings of the Interstate Commerce Commission, that plaintiffs' leasing of warehousing space to lessees, permitting the use of such space by and their rendition of services to the public at less than "cost" to plaintiffs, are sufficient in law to establish that plaintiffs thereby make "concessions" and are guilty of un-

lawful discriminations and prejudices in violation of Sections 2, 3 and 6 of the Interstate Commerce Act (U. S. C., Title 49, Ch. 1).

5. In failing to hold that the Interstate Commerce Commission should have found that plaintiffs, as a matter of law, may be guilty of making concessions, discriminations and preferences, in violation of Sections 2, 3 and 6 of the Interstate Commerce Act, in connection with the leases, rentals and services referred to in said order of the Commission, only if and to the extent that plaintiffs may be found to make leases or render services at less than the reasonable worth thereof; such reasonable worth being ordinarily measurable by the prevailing market values.

6. In holding that plaintiffs in making leases and rendering services at prevailing market values, are nevertheless, guilty of making concessions, in violation of Sections 2, 3 and 6 of the Interstate Commerce Act, if such prevailing market values are less than the "cost" to plaintiffs of so doing.

7. In holding that although plaintiffs have published and observed tariffs covering "in-transit" storage, handling and other services rendered by plaintiffs in connection with [fol. 634] goods that are in process of transportation over plaintiffs' railroads, plaintiffs may never the less be guilty, as to such services, of violations of Sections 2, 3 and 6 of the Interstate Commerce Act as found by the Interstate Commerce Commission.

8. In failing to hold that by publishing and observing tariffs covering "in-transit" storage, handling and other services rendered by plaintiffs in connection with goods that are in process of transportation over plaintiffs' railroads, plaintiffs, as to such services, may not, as a matter of law, be guilty of violations of Sections 2, 3 and 6 of the Interstate Commerce Act.

9. In holding that plaintiffs' said "in-transit" storage, handling and other services, for which rates and charges are published in tariffs and uniformly collected, are "voluntary commercial services", and that, to the extent that plaintiffs are out of pocket in rendering said services at said tariff rates and charges plaintiffs reduce their tariff rates for line-haul transportation, in violation of sections 2, 3 and 6 of the Interstate Commerce Act.

10. In failing to hold that said "in-transit" storage, handling and other services, for which rates and charges are and must be published by plaintiffs in tariffs duly filed, and uniformly collected, are transportation services as defined in said Interstate Commerce Act, and that plaintiffs' acts in compliance with said published tariffs cannot, as a matter of law, constitute concessions from plaintiffs' published tariffs covering their line-haul transportation, in violations [fol. 635] of Sections 2, 3 and 6 of the Interstate Commerce Act.

11. In failing to hold that said order of the Interstate Commerce Commission, in that it does not permit plaintiffs to make leases of their property and render services at the reasonable worth thereof as ordinarily measured by the prevailing market values, but instead imposes upon plaintiffs observance of a "cost" standard not found by the Commission to have any relation to reasonable worth or prevailing market values, takes the property of plaintiffs without due process of law and for public use without just compensation, and deprives plaintiffs of their liberty, in violation of the Fifth Amendment to the Constitution of the United States.

12. In failing to hold that said order of the Interstate Commerce Commission may compel plaintiffs to fix minimum rentals so high that plaintiffs will not be able to find tenants for their buildings, warehouses and piers and will be compelled to permit said buildings, warehouses and piers to become unoccupied and useless, thus depriving plaintiffs of their liberty and property without due process of law and taking their property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

13. In failing to hold that the Interstate Commerce Commission was without authority to make the order of February 2, 1937, complained of in plaintiffs' petition herein, because (a) the reports which are made a part of the order [fol. 636] do not contain findings requisite to support the order, (b) the findings which the reports contain are erroneous in law, and (c) the said reports are arbitrary and contrary to previous decisions of both the courts and the Interstate Commerce Commission upholding the right of com-

mon carriers by railroad to lease property to shippers at reasonable rentals ordinarily measured by currently prevailing rentals.

14. In holding that said order of the Interstate Commerce Commission is sufficiently definite and certain.

15. In failing to hold that said order is void for indefiniteness and uncertainty.

16. In holding that said order was within the power of the Interstate Commerce Commission.

17. In failing to hold that said order is invalid because it does not adhere to the standards prescribed by the Interstate Commerce Act.

18. In holding that said order is a valid and lawful order.

19. In making and filing its conclusions of law.

20. In making and filing findings of fact beyond the limited scope of the issues presented to the Court in plaintiffs' petition, in that instead of examining the evidence not to make findings for the Commission but merely to ascertain whether the Commission's findings are adequate and properly supported, the Court has examined into the evidentiary facts before the Commission, which is the fact-finding body, and into the discursive discussion in the reports of the [fol. 637] Commission in order to resolve opposing contentions as to what said facts and said discussion show and to spell out and state such conclusions of fact as in the judgment of the Court the evidentiary facts before the Commission and the discussion in its reports may permit.

21. In failing to sustain and give effect to plaintiffs' objections to the findings of fact and conclusions of law proposed by defendants.

22. In failing to make and file the findings of fact and conclusions of law proposed by plaintiffs.

23. In failing to grant the injunction prayed for in plaintiffs' petition herein.

24. In making and entering its final decree dismissing plaintiffs' petition.

III

PRAYER FOR REVERSAL

For which errors plaintiffs pray that the order and decree of the specially constituted District Court of the United States for the Southern District of New York, made and entered the 23rd day of March, 1938 in the above entitled cause, be reversed and that said District Court be directed to enter a decree granting the petition of plaintiffs, and that the order of the Interstate Commerce Commission referred to in said petition be declared void and perpetually set aside, suspended and annulled and its enforcement and effect enjoined, and that plaintiffs have such other and further relief as may be appropriate.

Edwin H. Burgess, Solicitor for Plaintiffs, 143 Liberty Street, New York, N. Y. C. R. Webber, A. H. Elder, W. J. Larrabee, M. B. Pierce, C. W. Meyer, Guernsey Orcutt, of Counsel.

[fol. 646] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 3, 1938

The plaintiffs in the above entitled cause and each of them, having presented and filed their petition praying for the allowance of an appeal to the Supreme Court of the United States from the final order and decree of this Court made and entered herein on the 23rd day of March, 1938, and from each and every part thereof, and having presented and filed their assignment of errors, prayer for reversal and a statement as to jurisdiction pursuant to the statutes and rules in such case made and provided, it is

Ordered, That an appeal by plaintiffs be, and the same is hereby, allowed, as prayed, to the Supreme Court of the United States from the final order and decree made and entered in this cause on March 23, 1938, by the District Court of the United States for the Southern District of New York, and the Clerk is directed to make and certify a transcript of the material parts of the record, proceedings,

papers and decree in this cause, and transmit the same to [fols. 647-650] the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date, and it is

Further Ordered, That the bond on appeal be and the same is hereby fixed at the sum of \$2000.00.

Dated April 25, 1938.

(Sgd.) Harrie B. Chase, U. S. C. J. Robert P. Patterson, U. S. D. J. — Hulbert, U. S. D. J.

[fol. 651] IN UNITED STATES DISTRICT COURT

[Title omitted].

NOTICE TO THE ATTORNEY GENERAL OF STATE OF NEW YORK—
Filed May 6, 1938

To the Honorable John J. Bennett, Attorney General of the State of New York:

Pursuant to Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220 (Judicial Code, Section 210), you are hereby notified that plaintiffs, The Baltimore and Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; The New York Central Railroad Company; The Pennsylvania Railroad Company, and Lehigh Valley Railroad Company, have taken an appeal to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District of New York, entered March 23, 1938, in the above entitled cause dismissing plaintiffs' petition therein for an order enjoining and setting aside an order of the Interstate Commerce Commission, dated February 2, 1937, in a proceeding before it entitled, "*Ex Parte 104, Practitioners of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at the Port of New York*", and the order of said [fols. 652-653] District Court allowing the appeal makes the same returnable within forty days from the date hereof.

Dated May 3, 1938.

Yours, etc., Edwin H. Burgess, Solicitor for Plaintiffs, 143 Liberty Street, Borough of Manhattan, New York, N. Y.

[fol. 654] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed May 6, 1938

To the Hon. Charles Weiser, Clerk:

You Are Hereby respectfully requested to prepare and certify a transcript of the record in the above-entitled cause for use of the Supreme Court of the United States on appeal, including therein the following:

1. Petition Of Plaintiffs, with Exhibits A to P, both inclusive, attached thereto.
2. Order Constituting Court.
3. Answer Of The United States.
4. Petition Of Intervention Of Warehousemen's Protective Committee And Order Allowing Intervention.
5. Answer Of Warehousemen's Protective Committee.
6. Petition Of Intervention Of Interstate Commerce Commission And Order Allowing Intervention.
7. Answer Of Interstate Commerce Commission.
8. Petition And Notice Of Motion To Intervene Of American Warehousemen's Association, Merchandise Division.
9. Order Permitting American Warehousemen's Association, Merchandise Division, to Intervene.
10. Answer Of American Warehousemen's Association, Merchandise Division.
- [fol. 655] 11. Order Setting Case For Hearing.
12. Petition Of Boston Port Authority To Intervene.
13. Order Permitting Boston Port Authority To Intervene.
14. Answer Of Boston Port Authority.
15. Petition Of City Of Boston To Intervene.
16. Order Permitting City Of Boston To Intervene.
17. Answer Of City Of Boston.
18. Opinion Of the Court, by Judge Chase.
19. Concurring Opinion by Judge Hulbert.
20. Application of Plaintiffs For Stay Pending Appeal.
21. Order To Show Cause.
22. Stay Order.
23. Defendants' Proposed Findings Of Fact And Conclusions of Law.

24. Plaintiffs' Objections To Defendants' Proposed Findings Of Fact And Conclusions Of Law And Plaintiffs' Counter Proposals.

25. Findings Of Fact And Conclusions Of Law, filed by Court on March 23, 1938.

26. Final Decree.

27. Petition For Appeal, Assignment of Errors, And Prayer For Reversal.

28. Statement As To Jurisdiction On Appeal.

29. Bond On Appeal.

30. Order Allowing Appeal.

31. Citation On Appeal With Admissions Of Service.

32. Notice Pursuant To Rule 12 (2) Of Rules Of Supreme Court.

33. Notice To Attorney General Of New York.

[fols. 656-657] 34. All acknowledgments, or proofs, of service of foregoing papers.

35. Plaintiffs' Praecipe For Record, with admissions of service.

36. Clerk's certificate.

Dated this 3rd day of May, 1938.

Edwin H. Burgess, Solicitor for Plaintiffs, 143 Liberty Street, New York, N. Y.

[fol. 658] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' PRAECIPE FOR TRANSCRIPT OF RECORD

To the Honorable Charles Weiser, Clerk:

In preparing the transcript of record in the above-entitled cause on appeal to the Supreme Court of the United States, please include therein, in addition to the matters specified in the plaintiffs' praecipe, the following:

1. Affidavits submitted in behalf of defendants in opposition to the granting of the stay pending appeal.

2. Order of the court dated May 12, 1938, directing that the certified copies of the testimony and exhibits and of the oral argument before the Interstate Commerce Com-

mission in its Docket No. Ex Parte 104, be transmitted to the Supreme Court on appeal instead of transcripts thereof.

3. This praecipe.

Elmer B. Collins, Solicitor for United States. J. Stanley Payne, Solicitor for Interstate Commerce Commission. J. J. Hickey, Solicitor for Warehousemen's Protective Committee. A. Lane Cricher, Solicitor for American Warehousemen's Association, Merchandise Division. Henry E. Foley, Solicitor for Boston Port Authority and City of Boston.

[fol. 660] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF FRANCIS J. ANGERS

STATE OF NEW YORK,
County of New York, ss:

Francis J. Angers, of full age, being duly sworn, on his oath deposes and says:

(1) I reside at 8523 Wareham Road, Jamaica Estates, Long Island, New York. I am Assistant Secretary of New York Dock Company and have been in the employ of that company for upwards of thirty years.

(2) The New York Dock Company is a corporation organized and existing under the laws of the State of New York, having its principal offices at 44 Whitehall Street, New York, New York; its properties are located on the Brooklyn waterfront, including storage warehouses having an aggregate area of approximately 2,500,000 square feet.

(3) New York Dock Company engages in the storage of merchandise for others for hire and in my capacity of Assistant Secretary the solicitation of the Company's storage business is under my jurisdiction. In the conduct of that [fol. 661] business the New York Dock Company is in active competition with other public warehousemen throughout the Port of New York area. It is also subjected to active competition of the Trunk Line Railroads entering the Port of New York, who, in addition to performing the usual func-

tions of the railroad carriers, actively solicit the commercial storage of merchandise. The New York Dock Company holds itself out to receive merchandise and receives, and ships merchandise outbound which is transported in interstate commerce by the plaintiffs in this proceeding.

(4) Large volumes of merchandise stored by its customers in its warehouses in Brooklyn have been and are being diverted from its premises and facilities to the storage facilities of Trunk Line Railroads, plaintiffs in this proceeding, through inducements made by said carriers in the form of rates for storage and handling services, which rates are sub-normal and far below recognized costs in our business and which private warehousemen cannot meet. Moreover, this competition is further aggravated by the practices of those carriers by absorption of fire insurance rates and by sub-normal rentals and other devices.

(5) Following investigations of the Interstate Commerce Commission into the storage and warehousing practices of carriers of the Port of New York, (the reports of which are exhibits in this proceeding) some minor amendments in the carriers' rates and practices have occurred but the New York Dock Company is today deprived of a substantial amount of regular business of its regular customers by reason of the continuing unjustifiably low rates extended by the plaintiffs. Notable among the commodities thus stored by said carriers in such competition are cocoa beans [fol. 662] and crude rubber. Those commodities are stored by said carriers in large volume and while stated to be stored for transit purposes, are in fact so stored by them primarily because of the low rates charged by said plaintiffs.

(6) On numerous occasions and at the present time large quantities of such merchandise are being withdrawn from storage in this Company's warehouses to be stored in the warehouses of the plaintiffs, or caused by them to be stored elsewhere at their unjustifiably low rates. For Example:

(a) On December 5, 1936, there were withdrawn from storage in this Company's warehouses 1,444 cases of crude rubber and sent to the Baltimore & Ohio Railroad Company for storage in transit, the shipments being moved in the following cars:

Rock Island 157143	300 cases.
Big Four 48010	288 "
New York Central 181724	300 "
L. & N. 13942	265 "
Reading 101982	291 "

(b) On December 26, 1936, there were withdrawn from storage with this Company 245 cases of rubber and sent to the Pennsylvania Railroad Company for storage in transit in car CN 464307.

(7) The plaintiffs have not discontinued their unlawful practices as pointed out by the Commission in its first report, (an exhibit in this proceeding), but have continued to subject the business of the deponent to unjust discriminations and prejudices, as found by the Interstate Commerce Commission. The New York Dock Company is thereby continually subjected to irreparable loss and injury.

Whereon, the deponent prays that the stay be denied.

Francis J. Angers.

Sworn to before me this 21st day of October, 1937.
W. M. Robers (?), Notary Public.

[fol. 663] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF STUART J. STEERS

STATE OF NEW YORK,
County of New York, ss:

Stuart J. Steers of full age, being duly sworn, on his oath deposes and says:

(1) I reside at Hudson View Gardens, 183rd Street and Pinehurst Avenue, Borough of Manhattan, City and State of New York, and now am, and throughout the past 18 years have been, Vice President of North River Stores, Inc.

North River Stores, Inc. is a corporation organized in 1918 under the laws of the State of New York and has general offices and a warehouse at No. 288-289 West Street, in the Borough of Manhattan, City and State of New York.

(2) Said North River Stores, Inc. is engaged solely in the business of public warehousing and throughout the past 10 years has operated a public merchandise storage warehouse in the said location in the Borough of Manhattan. In performing its functions of public merchandise warehousing the North River Stores, Inc. holds itself out to receive freight and to ship freight outbound which is transported in [fol. 664] interstate commerce by the plaintiffs in this proceeding. Said North River Stores, Inc. throughout the past 10 years has stored large quantities of goods, wares and merchandise which have been transported to and from its said warehouse by Pennsylvania Railroad, Delaware, Lackawanna & Western Railroad, New York Central Railroad and Lehigh Valley Railroad and other plaintiffs.

(3) The assessed valuation for taxation purposes of the land and building used by the North River Stores, Inc. is \$100,000; New York City real estate taxes thereon aggregate upwards of \$2,700 annually, and the revenue derived by said North River Stores, Inc. to pay rent, taxes, investment charges and other expenses is that accruing from its rates and charges for the storage and handling of merchandise in its said warehouse.

(4) In the conduct of its said merchandise warehousing business said North River Stores, Inc. has encountered, and still faces the competition of the plaintiffs who are also engaged in the commercial storage and handling of goods, wares and merchandise in warehouses which they own or control and in warehouse space owned and controlled by plaintiffs within the Port of New York District.

In the conduct of the merchandise warehousing business of plaintiffs and their leasing of space for warehousing purposes they have available the great financial resources of their common carrier treasuries and, furthermore, government loans to supplement their private funds.

(5) In said competitive solicitation for storage of goods, wares and merchandise, the rates and charges which plaintiffs have established and exact for the storage and handling [fol. 665] of goods, and the rates of insurance (including their absorptions) which they give on goods stored in their possession, are very important factors.

(6) Deponent testified in the proceeding before the Interstate Commerce Commission and pointed out instances in

which its business was subjected to unjust discrimination and undue prejudice by the plaintiffs. These discriminations have been and are continuing. For example, deponent directs attention to the following instance, which arose subsequent to the last public hearing before the Commission:

A consignment of 85,000 cases of canned fruit, shipped from Hawaii, arrived in New York City on October 12, 1937, on the S/S "Chattanooga City". I have stored this commodity for the same owner for the past ten years; this consignment was not stored with North River Stores, Inc. but, by reason of the practices made the subject of the Commission's orders in this cause, was stored in the property of the Lehigh Valley Railroad at Black Tom, New Jersey, at a month to month rate or charge of less than 2¢ per square foot for only the warehouse space actually used, whereas North River Stores, Inc. like other warehouses, must rent facilities and pay its rentals on both occupied and unoccupied space over a period of years.

Such charges are not only below fair market value but far below the cost of doing business as recognized in our trade, the rental basis evidently having been used to circumvent applicable tariff provisions.

[fol. 666] (7) Following the first order of the Interstate Commerce Commission in this cause the plaintiffs have had opportunity to discontinue their unlawful practices. But instead of discontinuance they have continued to and are now subjecting the business of deponent to unjust discrimination and undue prejudice as found by the Commission and thereby are subjecting North River Stores, Inc., to irreparable loss and injury. Wherefore, deponent prays that the stay be denied.

Stuart J. Steers.

Sworn to before me this 21st day of October, 1937.
H. M. Hinshaw, Notary Public.

[fol. 667] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ALBERT B. DRAKE

STATE OF NEW JERSEY,
County of Hudson, ss:

Albert B. Drake, of full age, being duly sworn on his oath deposes and says:

I reside at Short Hills in the State of New Jersey and I am President of the Lehigh Warehouse and Transportation Company.

Said Lehigh Warehouse and Transportation Company is a corporation organized under the laws of the State of New Jersey, having a general office and place of business at No. 98-108 Frelinghuysen Avenue, in the City of Newark, in the State of New Jersey. The said Company operates a warehouse at the said location in Newark and is there engaged in the general warehousing business of storing and handling merchandise for hire.

I testified at the hearing before the Interstate Commerce Commission in the case under review and therein complained of the unfair competition of several of the plaintiffs in that they offered to store and handle and did store and handle merchandise at rates and charges below the costs of storing and handling the merchandise.

The plaintiffs have not discontinued the unfair competition and they now deprive the Lehigh Warehouse and Transportation Company of opportunity to participate in the storage and handling of large quantities of merchandise in that the plaintiffs store and handle the merchandise and lease warehouse space at rates charges and rents below service costs which precludes the Lehigh Warehouse and Transportation Company from offering to store or handle, or accepting for storage and handling, the said merchandise at rates and charges as low as the rates and charges of the plaintiffs.

The said unfair competition of plaintiffs and their subnormal rates and charges have subjected and until changed and corrected, will continue to subject the Lehigh Ware-

house and Transportation Company to large and continuing financial losses.

Wherefore, deponent prays that the stay be denied.

(Signed) Albert B. Drake, Deponent.

Subscribed and sworn to before me this 21st day of October, 1937. Rosa J. Schaufelberger, Notary Public of New Jersey. My Commission expires Jan. 10, 1940.

[fol. 669] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HARRY E. WARD

STATE OF NEW YORK,

County of New York, ss:

Harry E. Ward of full age, being duly sworn, on his oath deposes and says:

(1) I reside at 8076—88th Road, Woodhaven, Long Island, New York, and am Assistant Secretary of Bush Terminal Company and have been in the employ of that company for twenty-two years.

Bush Terminal Company is a corporation organized and existing under the laws of the State of New York and has its principal office at 100 Broad Street, New York, New York. Its properties are located on the Brooklyn waterfront, it has storage facilities of approximately upwards of 1,000,000 square feet of space which it utilizes in the storage of goods, wares and merchandise for its customers, which goods are shipped in interstate and foreign commerce and are received from and shipped out over the railroad facilities of the plaintiffs in this proceeding. The Bush Terminal Company has engaged in the business of public warehousing business for over thirty years.

[fol. 670] (2) The Bush Terminal Company in the conduct of its public warehousing business receives, stores, ships and handles goods, wares and merchandise in competition with other public warehouses and faces the competition of the commercial warehousing activities of the plaintiffs in this proceeding. In such competition and solici-

tion of storage and handling of goods the rates and charges which plaintiffs have established for warehousing merchandise and the insurance charges which they have established on goods stored in their possession are not only an important factor but are direct inducements in diverting storage business from established warehousemen.

(3) In the competition of the commercial warehousing activities of the facilities owned and controlled by the plaintiffs in this cause, the Bush Terminal Company cannot meet the rates and charges of the plaintiffs without suffering severe losses. The rivalry between carriers in their efforts to obtain traffic and to obtain warehousing business has long since reached the point where the charges extended for the warehouse service by the plaintiffs are not only lower than the fair market value but also below the actual cost of operation.

(4) Not only has the Bush Terminal Company been subject to unjust discrimination and undue prejudice within the meaning of Sections 2 and 3 of the Interstate Commerce Act, as found by the Interstate Commerce Commission, but the actions of the plaintiffs to which the orders of the Interstate Commerce Commission in this cause have been directed, have continued and are resulting in irreparable damage and loss to the Bush Terminal Company and examples of such loss of business are cited in the following paragraph:

[fol. 671] (a) On October 15, 1936, there were withdrawn from storage in Bush Terminal Company Warehouse 307 cases of Crude Rubber which were shipped to the Delaware, Lackawanna & Western Railroad on its waybill 10062 in NYC car 180299 to be stored in transit at Lackawanna Terminal Warehouse.

(b) On December 26, 1936, there were withdrawn from storage in Bush Terminal Warehouse 299 cases of Crude Rubber which were shipped to Pennsylvania Railroad Company under its waybill 64298 in car N & W 41693 to be stored in transit at Manhattan Piers, New Jersey.

The plaintiffs have not discontinued their practices and are causing loss and damage to Bush Terminal Company by the unjust discrimination and undue prejudice as found by the Commission in its reports in this proceeding and

thereby Bush Terminal Company is subjected to irreparable damage and injury.

Wherefore, deponent prays that the stay be denied.

Harry E. Ward.

Sworn to before me this 21st day of October, 1937.
H. M. Hinshaw, Notary public.

[fol. 672] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING PART OF ORIGINAL RECORD TO BE TRANSMITTED ON APPEAL—Filed May 12, 1938

Good cause appearing therefor,

It is Ordered and Decreed, That the certified copies of the testimony and exhibits and of the oral argument before the Interstate Commerce Commission in its Docket No. Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y., received in evidence in the above-entitled cause, be transmitted to the Supreme Court on appeal instead of transcripts thereof.

Murray Hulbert, District Judge. Robert P. Patterson, District Judge. Harrie B. Chase, Circuit Judge.

New York, N. Y., May 12, 1938.

[fols. 673-675] Citation, in usual form, showing service on Elmer B. Collins et al., filed May 6, 1938, omitted in printing.

[fols. 676-677] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is Hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court

in the above-entitled matter as agreed on by the parties, in so far as said record is called for by plaintiffs' and defendants' principles.

Dated June 13th, 1938.

Edwin H. Burgess, Attorney for Plaintiffs. J. Stanley Payne, Attorney for Defendants.

[fols. 678-679] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 680] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Filed June 2, 1938

For Good Cause and upon the annexed stipulation of counsel for all parties, the time for docketing the above entitled case and filing the record on appeal thereof with the Clerk of the Supreme Court of the United States, is hereby enlarged and extended to and including June 20, 1938.

Dated 6/2/38.

(Sgd.) Charles Weiser, Clerk.

[fol. 680½] [File endorsement omitted.]

[fol. 681] SUPREME COURT OF THE UNITED STATES

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed June 28, 1938

I

POINTS ON WHICH APPELLANTS INTEND TO RELY

Appellants, both in brief and on oral argument, will rely upon each and every of the points raised specifically in their assignments of error filed herein, which said points, without omitting any thereof but for purposes of convenience and clarity, may be more definitely and succinctly stated as follows:

Point 1

The Interstate Commerce Commission's order, insofar as it commands appellants to cease and desist from permitting

shippers in interstate commerce over their railroads to occupy space by lease or otherwise in their warehouses, buildings or piers at rentals and charges which fail to compensate them for the "cost" of providing such space, is [fol. 682] based upon an error of law, in that the basic finding of the Commission, that appellants make "concessions" by so doing, is erroneous in law, and is insufficient to establish any violation of Section 2, 3 or 6 of the Interstate Commerce Act.

Point 2.

The Interstate Commerce Commission's order, insofar as it commands appellants to cease and desist from storing goods for or providing storage space to shippers in interstate commerce over their railroads at rates and charges which fail to compensate them for the "cost" of providing such storage or storage space, is based upon an error of law, in that the basic finding of the Commission that appellants make "concessions" by so doing, is erroneous in law, and insufficient to establish any violation of Section 2, 3 or 6 of the Interstate Commerce Act.

Point 3

The Interstate Commerce Commission's order is invalid in that it would deprive appellants of their property without due process since the "cost" standard it imposes is not supported by any findings that appellants' failure to get such "cost" for renting space to or for storing goods for, or providing storage space to shippers in interstate commerce over their railroads, results in any rentals or charges to such shippers that are less than the reasonable worth, as ordinarily measured by the prevailing market value, of the space rented or provided or storage performed by appellants, and in that said "cost" standard is wholly undefined and therefore vague and indefinite and not capable of uniform application at any time to each appellant.

Point 4

The Interstate Commerce Commission's order, insofar as it requires appellants to cease and desist from the performance of "in transit" storage, handling and insurance services in connection with interstate transportation of

goods over their railroads at rates and charges which fail to compensate them for the "cost" of such services is based upon an error of law, in that the performance of said "in-transit" services and the rates and charges to be collected therefor are all provided for in tariffs duly filed, published and observed by appellants in the manner required by law and, therefore, the basic finding of the Commission that appellants make "concessions" by rendering such services at less than "cost" is erroneous in law and insufficient to establish violation of Section 2, 3 or 6 of the Interstate Commerce Act.

II

DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION OF THE POINTS TO BE RELIED UPON BY APPELLANTS

Appellants, pursuant to Rule 13 (9), state that the entire transcript of the record on appeal, as designated in the praecipes of the respective parties, is necessary for consideration of the points on which appellants intend to rely, except and not including the following:

1. All proof of service by affidavit and all admissions of service of pleadings and other documents.

2. Form of proposed "Order Granting Leave To Intervene" annexed to petition of the Warehousemen's Protective Committee for leave to intervene.

3. Form of proposed "Order Granting Leave to Intervene" annexed to petition of The American Warehousemen's Association, Merchandise Division, for leave to intervene.

4. Findings of fact as proposed by defendants; this omission to be indicated by a notation reading:

"Findings of fact as proposed by defendants are omitted from printing because they are identical with those subsequently found by the Court."

5. Bond for damages and costs.

6. Affidavits of Francis J. Angers; Stuart J. Steers; Albert B. Drake and Harry E. Ward, each verified October 21, 1937, as designated in item 1 of the praecipes of defendants-appellees.

Appellants do not think that the testimony, exhibits or oral argument before the Interstate Commerce Commission in its docket Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y., referred to in the order of May 12, 1938 of the United States District Court, Southern District of New York, or [fol. 685] any part thereof, is necessary for the consideration of the points upon which appellants intend to rely, and appellants therefore do not designate any of said testimony, exhibits or oral argument for such consideration.

Edwin H. Burgess, Counsel for Appellants. Alex. H. Elder; Thomas P. Healy, Walter J. Larrabee, Guernsey Orcutt, Herbert A. Taylor, Charles R. Webber, of Counsel.

[fol. 686] [File endorsement omitted.]

[fol. 687] IN SUPREME COURT OF THE UNITED STATES

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF RECORD
NECESSARY FOR CONSIDERATION BY THE COURT—Filed July
6, 1938

Appellees, pursuant to Rule 13 (9), state that the following parts of the transcript of the record on appeal, in addition to those designated by appellants, are material and should be printed as part of the record on appeal:

Affidavits of Francis J. Angus, Stuart J. Steers, Harry E. Ward and Albert B. Drake, each verified October 21, 1937, as designated in Item 1 of the praecipe of defendants-appellees (referred to in Item 6 of omitted portions of appellees' designation).

Appellees think that the testimony, exhibits and oral argument before the Interstate Commerce Commission in its Docket Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y., transmitted to and filed with this Court as original [fol. 688] exhibits pursuant to the order of the court below dated May 12, 1938, will be necessary and material for the consideration of the Court in determining the questions in-

volved in this appeal, but appellees do not designate these documents for printing because they are before this Court as original exhibits under Rule 10 (4), and it is appellant's understanding that, as such original exhibits, the Court will consider them along with the transcript and that they may be referred to in brief and in oral argument by counsel for any party as though they were printed as part of the transcript of record on appeal.

N. A. Townsend, Acting Solicitor General of the United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, Counsel for appellees, United States of America and Interstate Commerce Commission.

[fol. 689] [File endorsement omitted.]

Endorsed on cover: File No. 42,618. S. New York, D. C. U. S. Term No. 133. The Baltimore and Ohio Railroad Company et al., appellants, vs. The United States of America, Interstate Commerce Commission, et al. Filed June 20, 1938. Term No. 133, O. T., 1938.

(7661)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 133

THE BALTIMORE AND OHIO RAILROAD COMPANY
ET AL.,

Appellants

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

✓ EDWIN H. BURGESS,
✓ C. R. WEDDER,
✓ A. H. EIDER,
✓ W. J. LARBAE, JR.,
✓ M. B. PIERCE,
C. W. MEYER,
✓ GUERNSEY ORCUTT,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Equity No. 84,402.

THE BALTIMORE AND OHIO RAILROAD COMPANY
ET AL., *Plaintiffs,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.,
Defendants.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES:

**STATEMENT AS TO JURISDICTION ON APPEAL TO
THE SUPREME COURT OF THE UNITED STATES.**

The plaintiffs, appellants, in support of jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, and in compliance with Rule 12 of the Rules of the Supreme Court, respectfully represent:

I.

Statutory Provisions Sustaining Jurisdiction.

It is provided in Sections 41 (28), 44 and 47 of Title 28, United States Code (Ch. 32, 38 Stat. L. 219-220) that an

action may be brought to enjoin, set aside, annul or suspend, in whole or in part, any order made or entered by the Interstate Commerce Commission, by petition to any District Court of the United States, and that the judge of such District Court shall immediately call to his assistance to hear and determine the matter two other judges, one of whom shall be a circuit judge. Section 47 also provides that an appeal may be taken direct to the Supreme Court of the United States.

Section 47a of Title 28, United States Code, (Judicial Code, Section 210, Chapter 32, 38 Stat. L. 220) provides as follows:

"A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * * The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court * * *"

In addition, it is further provided in Section 345 of Title 28, United States Code (Judicial Code, Section 238, Chapter 229, 43 Stat. L. 938), that a direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had in certain classes of cases, including in subdivision (4) of said Section:

"suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money".

II.

Decree.

The decree sought to be reviewed herein dismissed plaintiffs' petition and was entered March 23, 1938.

The petition for appeal was filed on the 25th day of April, 1938, and the order allowing the appeal was entered on the 25th day of April, 1938.

III.

Nature of Case and Ruling of the District Court.

This suit was brought in a specially constituted District Court of the United States for the Southern District of New York against the United States, by the plaintiffs, appellants, The Baltimore and Ohio Railroad Company; The Central Railroad Company of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; The New York Central Railroad Company and The Pennsylvania Railroad Company, under authority of the Act of Congress approved October 22, 1913, 38 Stat. at L. 219 (28 U. S. C. A., Sections 41 (28) 44, 45, 46, 47) and under the general equity jurisdiction of the Court.

Plaintiffs prayed for a decree enjoining, setting aside, suspending and annulling an order of the Interstate Commerce Commission, dated February 2, 1937, and the reports of said Commission therein referred to, in a proceeding before that body entitled, "*Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses, Part VI, Warehousing and Storage of Property by Carriers at the Port of New York*". The said order and reports of the Interstate Commerce Commission required the plaintiff railroads to cease and desist from leasing space to shippers in warehouses, buildings or piers in the New York Harbor district at rentals which fail to compensate plaintiffs for the cost of providing the space leased, and from storing, handling or insuring goods of shippers at rates and charges which fail to compensate plaintiffs for the cost of performing such services.

Plaintiffs' petition for a decree to set aside, enjoin, suspend and annul the operation and enforcement of the said order and reports of the Commission was filed March 10, 1937, in the District Court of the United States for the Southern District of New York. Hearing before said Court, specially constituted of three judges pursuant to the aforesaid Act of October 22, 1913, was duly held, at which all the evidence of record before the Interstate Commerce Commission was received in evidence. Thereafter, on August 25, 1937, an opinion by said Court, together with a supplemental opinion by one of the judges thereof, was handed down denying plaintiffs' prayer for injunction and dismissing their petition. A copy of each of said opinions, marked respectively, Exhibit "A" and Exhibit "B", is hereto annexed and made a part hereof. No other opinions in this cause have been rendered by any court.

On March 23, 1938, Findings of Fact and Conclusions of Law in support of the Court's opinion of August 25, 1937, were made and filed by the District Court, and on that date the Court also made and entered its final decree dismissing the plaintiffs' petition for injunction.

Plaintiffs' practices as to the leasing of space in warehouses, buildings and piers, and the storage, handling and insurance of goods, which are prohibited by the Commission's order, are long standing in the commercial life of New York Harbor and were begun in good faith, long prior to the prohibition of said order, at a time when it was not and could not have been anticipated that "cost" to plaintiffs of providing such space and rendering such services, rather than the reasonable value thereof, was or might become the test of their lawfulness. The Commission's order in requiring absolute adherence by plaintiffs to the "cost" standard as the test of the lawfulness of their leasing of space and

5.
rendering of services, is at variance with other decisions of the Commission and the courts as to the tests of lawfulness of such practices by carriers.

The questions presented by this appeal are substantial. They involve the sufficiency in law of the findings made by the Interstate Commerce Commission, and sustained as sufficient by the District Court, to support the Commission's order under attack. The order rests (a) upon findings that plaintiffs make leases and perform services at less than "cost" to them of so doing and thereby make "concessions" from their published tariffs of line-haul transportation charges which constitute unlawful discriminations and prejudices, in violation of Sections 2, 3 and 6 of the Interstate Commerce Act, and (b) upon the further finding that although plaintiffs have published and uniformly observed tariffs covering the "in-transit" storage, handling and other services rendered by plaintiffs in connection with goods that are in process of transportation over plaintiffs' railroads, plaintiffs are nevertheless as to such services, guilty of concessions, discrimination and prejudice, in violation of Sections 2, 3 and 6 of the Interstate Commerce Act. The issue is whether such findings on the part of the Interstate Commerce Commission are adequate and sufficient in law to establish such violations of the Act.

The appeal also involves the power of the Commission to prevent plaintiffs from making leases and rendering services at less than "cost", except upon findings that the less-than-cost basis is also less than the reasonable worth of such leases and services as ordinarily measured by prevailing market values.

These questions, it is submitted, are substantial and of wide-spread importance owing to the prevalence and long duration of plaintiffs' practices and similar practices of other railroads generally.

IV.

Cases Sustaining Jurisdiction.

Interstate Commerce Commission v. Union Pacific Ry. Co., 222 U. S. 541/

Florida East Coast R. Co. v. United States, 234 U. S. 167.

The Los Angeles Switching Case, 234 U. S. 294.

Louisville & G. R. Co. v. United States, 242 U. S. 60.

Manufacturers R. Co. v. United States, 246 U. S. 457.

Skinner & Eddy Corp. v. United States, 249 U. S. 557.

New England Divisions Case, 261 U. S. 184.

Virginian Railway Co. v. United States, 272 U. S. 658.

Beaumont, Sour Lake & Western Railway Co. v. United State, 282 U. S. 74.

Florida v. United States, 282 U. S. 199.

Merchants Warehouse Co. v. United States, 283 U. S. 501.

United States v. Baltimore & Ohio, 293 U. S. 454.

United States v. C. M. St. P. & P. R. Co., 294 U. S. 499.

Respectfully submitted,

EDWIN H. BURGESS,
Solicitor for Plaintiffs,
143 Liberty Street,
New York, N. Y.

C. R. WEBBER,
A. H. ELDER,
W. J. LARRABEE,
M. B. PIERCE,
C. W. MEYER,
GUERNSEY ORCUTT.

Of Counsel.

Filed May 3, 1938.

7
EXHIBIT "A"

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.**

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*, Plaintiffs,
against

**THE UNITED STATES OF AMERICA, *Defendant*, and INTERSTATE
COMMERCE COMMISSION, *et al.*, *Intervening-Defendants*.**

**Before Chase, Circuit Judge and Patterson and Hulbert,
District Judges.**

In Equity. Petition by seven railroad companies engaged
in Interstate Commerce to enjoin and set aside an order of
the Interstate Commerce Commission.

Thomas P. Healy, Carleton W. Meyer, Solicitors for
above-named plaintiff.

Alex H. Elder, Richard J. Laly, Counsel for the Central
Railroad Co.

A. Lane Cricher, Counsel for American Warehousemen's
Ass'n Merchandise Div.

Orrin G. Judd, of Counsel.

Henry E. Foley, Solicitor for Intervenor; Searles,
James & Tyng, of Counsel.

John J. Hickey, Solicitor for Intervenor, Warehousemen's
Protective Committee.

Edwin H. Burgess, Solicitor for Plaintiffs; Charles R.
Webber, Walter J. Larrabee, M. B. Pierce, Guernsey Orcutt,
of Counsel.

Elmer B. Collins, Special Assistant to the Attorney Gen-
eral.

J. Stanley Payne, Assistant Chief Counsel, Interstate
Commerce Commission.

Robert H. Jackson, Assistant Attorney General.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce
Commission.

CHASE, Circuit Judge:

This suit was brought by seven common carriers in interstate commerce under the provisions of the Urgent Deficiencies Act and heard by a court of three judges constituted as the law requires. (38 Stat. 219; 28 U. S. C. A. Secs. 41 (28) and 43-48, inc.)

The plaintiffs are The Baltimore and Ohio Railroad Company; The Central Railroad of New Jersey; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; The New York Central Railroad Company; and The Pennsylvania Railroad Company. All of them transport freight by rail to and from the Port of New York District in interstate or foreign commerce or both. They all provide warehouse space and services for such freight both of the kind shown as in-transit and that classed as commercial; the latter kind being what is not essential to actual transportation of the goods. The plaintiffs are competitors among themselves for both the eastbound and westbound New York traffic and also with private corporations owning and operating warehouses in the New York District for that part of the business which is done by warehousemen.

The Interstate Commerce Commission undertook, on July 6, 1931, an investigation on its own motion in a proceeding entitled, Practices of Carriers Affecting Operating Revenues and Expenses, in which all common carriers by rail subject to the Interstate Commerce Act were made parties, to determine whether those carriers were being operated economically and efficiently within the provisions of Sec. 12 and 15 (a) of the Act. Thereafter, its attention was especially directed by complaints of warehousemen in the Port of New York District to the warehouse practices of the plaintiffs in that district and on January 6, 1932 it began an investigation, known as Ex Parte 104, in connection with its general proceeding above mentioned for the purpose of . . . establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, . . .

The object of this suit is to enjoin and set aside an order entered on February 2, 1937 by the Interstate Commerce Commission in subdivision Ex Parte 104 of the original proceeding requiring the plaintiffs to cease and desist before a future date fixed (and later extended so that it has not as yet become effective) from certain practices of which we are concerned only with that part which prohibits all the plaintiffs (except the Central Railroad of New Jersey as to furnishing insurance) from permitting shippers in interstate commerce over their lines from using space by lease or otherwise in warehouses, buildings or piers of the plaintiffs at rates and charges which do not compensate the plaintiffs for the cost of providing such space; from storing goods shipped over their lines in interstate commerce or providing commercial storage for shipping at less than cost; from directly or indirectly handling goods for shippers at such warehouses, buildings or piers at rates and charges which fail to compensate them for the cost of such handling; from insuring such goods for shippers at less than cost; and from " . . . applying, by means of tariffs now on file with this Commission . . . non-compensatory rates and charges . . . for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service". The Central Railroad of New Jersey also seeks to enjoin and set aside that part of the order prohibiting it from "subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said . . . carrier".

Before the order was made, the Interstate Commerce Commission had conducted hearings at length at which all parties were given the opportunity to present evidence and be heard. The Warehousemen's Protective Committee, an organization representing the independent warehouses in the District was allowed to intervene and take part. The City of Boston; the Boston Port Authority; and the American Warehousemen's Association, Merchandise Division, have become intervenors in this suit. The Commission filed its

first report on December 12, 1933 wherein it admonished the plaintiffs to change the practices it disapproved but made no order. On June 8, 1936, it filed a second report; and on February 2, 1937, a third report, which reaffirmed the others in so far as is now important, and made the order herein resisted. The order attacked is, accordingly, based upon the findings in all three reports.

In view of the restricted nature of the issues presented, it will not be necessary to state at length the substance of these reports to which reference, however, is made. It is sufficient presently to know that upon adequate evidence the Commission has found that the plaintiffs now do at less than cost all those things which the order prohibits them from doing at non-compensatory rates and charges. There is no finding that they do not conform to their published tariffs in so far as such tariffs cover the services provided but the indirect violation of Sect. 6 of the Interstate Commerce Act by the forbidden practices has been found in that those permitted to receive such below cost-services in effect move their goods at less than tariff rates and receive preferential treatment in violation of Sect. 3. While others not so favored are discriminated against in violation of Sec. 2.

The common complaint of all the plaintiffs is that the order was made after the denial of their motion to reopen the proceedings for the purpose of introducing evidence to show that the condemned services were provided at charges equivalent to their fair and reasonable value; that there are no findings sufficient to support it in that the Commission did not find that what the plaintiffs provided for shippers at less than cost was provided at less than the fair and reasonable value; and that cost is too vague and indefinite a term to make the order sufficiently definite to enable them to comply.

All this boils down to the one issue of whether or not the findings are sufficient support in law for the order made. If they are the plaintiffs were not prejudiced by the denial of their motion to reopen the proceedings. It is clear that the order must be based upon findings, supported by the evidence, which show it to be within the jurisdiction of the Commission as derived from the Act. *United States v. Chi-*

cago, M. St. P. & P. R. Co., 294 U. S. 499. The power to make the order, therefore, depends upon whether the providing of such services as were found to have been furnished for less than cost violates the Act in that some shippers are given more favorable treatment than others in like situation. It is not denied that that result would follow if such services were performed for some shippers only at less than their reasonable worth but it is insisted that reasonable worth and not cost is the true criterion by which their practices must be tested in the light of the provisions of the Act.

The argument, further developed in discussing later the special complaint of the Central Railroad of New Jersey, is that the plaintiffs have invested in warehouse facilities in the New York district at prices so high that they cannot successfully compete with warehousemen in that territory if they charge enough to return to them the cost of the service since their overhead is necessarily so high. That, of course, depends upon what treatment should be accorded excessive investment under accepted accounting standards in figuring cost. We are not now called upon to go to that subject. Moreover, we find no real substance to the argument that cost is too vague a term upon which to base the order. Cost is certainly as definite as the fair value standard for which the plaintiffs contend and since it can be figured from past actual experience would seem to be much more so. Indeed, it is idle to argue that cost does not admit of such definite calculation that the plaintiffs cannot comply with the order.

In any event we think the cost basis has been approved by authority which binds us. In *New York, N. H. & H. R. Co. v. Interstate Com. Commission*, 200 U. S. 351, 50 L. Ed. 515, the sale and transportation of coal at less than the cost of the coal plus transportation at tariff rates was held to violate Secs. 2, 3 and 6 of the Interstate Commerce Act. In giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, we can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both

at rates less than those of the published tariff plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation. In the present instance commercial warehousing, storage and insurance was sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned.

Though it is true that the published tariffs of the plaintiffs cover what is called in-transit storage and such tariff rates have been charged uniformly, it by no means follows that Sec. 2 and 3 have not been violated by the practices forbidden by the order. In its second report the Commission said: "The transit privilege permits the stopping of goods at an intermediate point between the point of shipment and final destination, and the reshipment from the intermediate point at the through freight rate lower than the combination of local rates which the shipper would otherwise pay. The privilege is of great importance to many shippers and its commercial necessity has long been recognized. We are not to be understood as condemning bona fide transit arrangements, but only the practice here considered in which the carriers, through stress of competition, have assumed by tariff publication a part of the cost of strictly commercial storage and handling of goods. * * *". And in its third report the Commission said in reference to this subject; "What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them and thereby violate sections 2, 3 and 6 of the act".

The violations of the Act which were amply proved and which the Commission pointed out broadly as the above

quotations show are based upon the voluntary performance by the carriers for some shippers only, in order to get or keep business, of commercial services in connection with transportation services at rates and charges which when added together do not return to the carriers the published tariff rates plus the cost of the commercial services. As to what are commercial services, see *Merchants Warehouse Co. v. United States*, 283 U. S. 303. To the extent that such cost is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carriers' loss had been paid. And this is so whether the voluntary commercial services performed by the carriers to get or hold business in the face of competition are charged at their fair value or not. If the carriers sustain losses in performing voluntary commercial services for shippers as an inducement to them to buy transportation of the carriers at the published tariff rates for the goods as to which such voluntary commercial services are performed, it can make no difference, in the effect of such practices on the tariff rates, that the voluntary commercial services were charged at their fair value if that happens for whatever reason to be less than the cost to the carriers. To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the Act makes applicable alike to all shippers under like circumstances and if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the evidence and has been found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not. That is the vice the order is designed to do away with and it will not

be cured if the fair value standard is substituted for the cost standard in respect to commercial services performed to get or hold transportation business. If the cost to the carriers of the inducing commercial services performed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the Act allow as surely whether the commercial services are charged at their fair value or not. In other words, fair value is immaterial except on the question of efficiency in connection with the determination of loss. So we agree with the Commission that the condemned practices do violate the Act and hold the order supported by the findings and generally within the scope of the Commission's power.

The New York Central Railroad Company was found to have leased space in its warehouses to the Mellish Company and the Auto Storage Company at less than cost for the storage of automobiles. These lessees were found to be shippers in interstate commerce over the New York Central's lines; to be competitors of warehouse companies in the New York District who were also shippers in interstate commerce over that railroad; and that the railroad paid allowances to those lessees for unloading and handling automobiles which were commercial services. The railroad has especially attacked these findings. In view of what was said as to commercial services and shippers within the meaning of the Act in *Warehouse Co. v. United States*, *supra*, we think the findings were justified by the evidence.

The Central Railroad Company of New Jersey, through a wholly owned subsidiary called the Newark Warehouse Company, built a large warehouse in Newark, N. J., in 1905. The railroad rented part of the building from its subsidiary for station space from 1906 to 1932 and the subsidiary operated the remainder as a warehouse until 1934 by which time it had accumulated a large deficit that had been increased by the termination of the railroad of its lease for station space in 1932. The building, after unsuccessful attempts had been made to sell it, was leased on June 1, 1934, to the Newark Central Warehouse Company, not connected

with the railroad or its subsidiaries, at a varying annual rental, based in part upon the earnings of the lessee, with the privilege of renewal after two years. The rental received during the first year was a little less than half the taxes on the building for that year and it is clear that the Commission's finding that the lease is non-compensatory is correct. The Newark Central Warehouse Company, as justifiably found by the Commission, "engages in a general warehouse business and performs any and all services necessary in conducting that business. In many instances it has dominion for transportation purposes as consignee or consignor . . . over goods shipped in interstate commerce and stored by it. It engages in whatever branch of the general warehousing business it considers profitable, including the handling of cars containing shipments for two or more consignees and occasionally handles the equivalent of pool cars. In some cases the warehouse company pays the freight charges to the railroad and later collects from the owners of the goods". This lessee is a shipper in interstate commerce over the railroad lines in competition with other such shippers and to the extent that it is allowed to use the railroad's warehouse (we treat the building as owned by the railroad as have the parties though the title is in a wholly owned subsidiary) at the expense of the road for commercial purposes in connection with the transportation services it buys of the road the published tariff rates of the railroad are in effect cut to it. This would be plain enough if the railroad let the Central Company so use the warehouse for nothing and an inadequate rental which has the effect of cutting the published tariff rates to the favored lessee shipper is a violation of Secs. 2, 5 and 6 of the Interstate Commerce Act. *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292. The prohibition of the order is the leasing at a non-compensatory rental of space which subsidizes and grants concessions to the lessee. The Commission drew the conclusion in its second report from sustaining evidence, ". . . that the warehouse is an adjunct of the railroad's traffic department, (and) that the latter has made continuous and intensive efforts to solicit traffic over its line for storage in the warehouse". That it had an in-

centive to do that not only to increase its traffic but also to increase its net rent under the terms of the lease is plain enough. It is no answer to the violations of the statute to say that as the railroad has a losing piece of property on its hands which it acquired in good faith it should be permitted to rent it for its fair rental value. That is true only provided so doing does not violate the law. While it may lawfully minimize its losses from bad investments it may not give concessions to a favored shipper which in effect permit the railroad to cut its published tariff rates to that shipper. In this respect all carriers subject to the provisions of the Interstate Commerce Act must stand and be treated alike whether they have made poor investments or not.

In what we have said we have reference, as did the Commission, to the necessity for rates and charges and rentals for commercial services which will not reduce in effect the published tariff rates for transportation services including such in-transit handling and storage as are properly included in such published tariffs. As such below-cost commercial services are distinguishable from what are properly transportation services we do not come into conflict with the principle that reasonable tariff rates need not be sufficient to give railroads a fair return on every transportation service rendered in respect to every part of its property so used. See, *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649; *Atlantic C. L. R. Co. v. North Carolina Corp. Com.* 206 U. S. 1.

We, therefore, are of the opinion that the findings of the Commission supported by the evidence show that it had the power to make the order in so far as it concerns every plaintiff and that the order is sufficiently certain and definite in terms to enable the plaintiffs to comply.

Bill dismissed with costs.

Concur

ROBERT P. PATTERSON,
U. S. D. J.

Filed August 25, 1937.

EXHIBIT "B".

No. 869.

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK.

E 84,402.

THE BALTIMORE AND OHIO RAILROAD COMPANY *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *Defendant.*

HULBERT, D. J., concurring:

With some misgiving, I concur in the opinion of Circuit Court Judge Chase whose conclusions are inescapable under the law as it now is.

The voluntary inquiry instituted by the Interstate Commerce Commission "Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues and Expenses" was upheld, generally, by the Supreme Court of the United States in the case of *United States of America and Interstate Commerce Commission, appellants, vs. American Sheet and Tin Plate Co., et al.*, No. 734, October Term, 1936, and particularly with reference to Part 2 of that proceeding having to do with terminal services.

The plaintiffs in the case now before this Court have published tariffs including the in-transit storage as well as the rates of carriage. The Interstate Commerce Commission has found that under the published tariff rates the storage charges at less than cost is a discrimination.

Under the doctrine enunciated in *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, I agree there is no practical distinction between service charges on the basis of cost and reasonable or fair value, but I am apprehensive that the effect thereof will be to substitute the uncertainty of rates in reliance upon

business competition for the certainty of published tariff rates and as a practical result the cost to shippers, and incidentally to the public, may, and probably will, increase since the warehousemen are not subject to any regulatory authority whatsoever.

(Sgd.) HULBERT,
U. S. D. J.

Dated, N. Y., Aug. 24, 1937.

Filed Aug. 25, 1937.

(6318)



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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *et al.*,
appellants,

vs.

THE UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION, *et al.*,
appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

I.

The Opinions of the Court Below.

The opinion of the District Court of the United States for the Southern District of New York is reported in 20 F. Supp. 273, and the concurring opinion of Judge Hulbert in 20 F. Supp. 917. A copy of each opinion appears in the printed record, beginning at page 302. There are no other opinions.

The District Court made and filed findings of fact and conclusions of law, which appear in the record, beginning at page 341.

II.**Jurisdiction.**

A statement of the grounds on which the jurisdiction of this Court is invoked was heretofore filed in accordance with the requirements of Rule 12. An order was entered on October 10, 1938, noting that probable jurisdiction had been shown.

III.**Statement of the Case.**

This is a direct appeal from a final decree of the District Court of the United States for the Southern District of New York, specially constituted of three judges, dismissing appellants' bill for injunction to set aside and restrain enforcement of an order of the Interstate Commerce Commission. The suit below was brought by seven interstate common carrier railroads* which serve and transport freight to and from the New York Harbor district. All own or control piers, warehouses and other buildings in which space is leased to shippers and others or in which storing and handling of goods are performed for shippers and others. When the storing and handling are in connection with goods in the course of rail transportation they are known as in-transit services and are covered by published tariffs (R. 36-39, 179, 303, 355), but when in connection with goods not in the course of such transportation are known as commercial or

* The Baltimore & Ohio Railroad Company,
The Central Railroad Company of New Jersey,
The Delaware, Lackawanna & Western Railroad Company,
Erie Railroad Company,
Lehigh Valley Railroad Company,
The New York Central Railroad Company,
The Pennsylvania Railroad Company.

on-transit services and are not covered by tariffs (R. 35, 0, 124, 303).

The order complained of is dated February 2, 1937, and appears in the printed record on pages 272-274. It requires the appellants to cease and desist,

(a) " * * * from permitting shippers in interstate commerce over said respondents' lines to occupy space by lease or otherwise in warehouses, buildings or piers, *at rates and charges which fail to compensate said respondents for the cost of providing said space;*

(b) " * * * from storing goods shipped over said respondents' lines in interstate commerce; or providing storage space to shippers * * * for commercial storage of goods, as fully defined in said reports, *at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space;*

(c) " * * * from directly or indirectly handling goods incident to commercial storage as fully defined and described in said reports, at said warehouses, buildings or piers for shippers * * * *at rates and charges which fail to compensate said respondents for the cost of said handling.*

(d) " * * * from insuring goods shipped over said respondents' lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers * * * *at less than the cost of providing such insurance;*

(e) " * * * from applying, by means of tariffs now on file with this Commission * * * *non-compensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.*" (Italics supplied.)

* Appellants herein.

4

This order was made by the Commission in a proceeding entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenue and Expenses*, which the Commission began upon its own motion in July, 1931, to determine whether all the railroads of the United States, including the seven appellants, were efficiently and economically operated. For convenience the investigation was divided into different parts. While it was pending certain warehouse operators in the Port of New York district, being desirous of entirely eliminating the competition of railroad warehouses, complained to the Commission of the warehouse practices of the seven appellant railroads in the district (R. 36, 127). In January, 1932, the Commission instituted Part VI of the general proceeding, entitled *Warehousing and Storage of Property By Carriers at Port of New York*, which part, according to the order instituting it, was

“* * * directed toward establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, namely, the carriers to which this notice is addressed, hereinafter termed respondents” (R. 27).

The Commission promulgated its first report in Part VI, without an order, on December 12, 1933, (R. 29), its second report, with an order, on June 8, 1936, (R. 119), and its third report, with the challenged order above mentioned, on February 2, 1937 (R. 268, 272). The third report affirms the others (R. 271) except as pointed out hereinafter, *infra* page 38, and the challenged order of February 2, supersedes the prior order (R. 271), so that the order under attack rests upon the findings in the three reports in Part VI.

These findings as to leases are substantially uniform in character and substance as to each of the seven appellant railroads, and taking those made with respect to the Central Railroad of New Jersey as representative of all the others are as follows (R. 159):

"The Jersey Central, through its said wholly owned subsidiary, permits the occupancy, by the Newark Central Warehouse Company, of the warehouse of its wholly owned subsidiary at Newark, N. J., described of record, *under leasing arrangements which fail to compensate said railroad for its cost in providing space in said warehouse.*"

"We find that, *by means of the leasing arrangements described of record, the Jersey Central reduces below the published tariff rates the transportation charges on interstate shipments handled or stored by the Newark Central Warehouse Company, and thereby the Jersey Central grants concessions on such interstate shipments to the extent of the difference between the cost to said railroad of providing said space and the amount which it receives for the occupancy thereof.*

"We further find that, *through such leasing arrangements and by granting such concessions, the Jersey Central is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, make and gives undue and unreasonable preferences and advantages to the Newark Central Warehouse Company and to shippers who store goods therewith, and subjects competing warehouse companies and shippers who store with such warehouse companies to undue and unreasonable prejudice and disadvantage in violation of section 3 of said act, and departs from its published tariff rates in violation of section 6 of said act.*" (Italics supplied.)

With respect to the storing of goods performed by all appellants the finding is that (R. 192),

"In the instant case, the carriers sell warehousing services at *less than the cost* of providing them * * *, and * * * in effect reduce their line-haul rates from shipside to destination on traffic stored in their warehouses."

Likewise, as to their in-transit services, the finding is that each appellant

* * * provides by tariff publication for storage, handling, and with the exception of the Jersey Central, for

insurance of carload freight in warehouses, buildings, or piers * * * at rates and charges which do not reimburse them for the full cost of providing said services independent of freight rates *thereby assuming* a part of the cost of conducting the commercial operations of shippers who store goods * * *.

and that doing so

" * * reduces below the published tariff rates the transportation charges paid by certain shippers * * * and results in concessions to said shippers to the extent of the difference between the cost to said respondents of providing such storage, handling, and insurance, and the amount which they receive therefor,"*

and that

" * * by granting such concessions, the respondent carriers are guilty of"*

violations of sections 2, 3 and 6 of the act (R. 196-197).

③ The substance of all these findings is that appellants make leases of property to shippers and render storage, handling and insurance service on goods for shippers at less than "cost."* By failing to obtain such "cost" the Commission concludes that the carriers in effect grant "concessions" to the shippers who are their tenants and patrons and that such concessions amount to a reduction for such tenants and patrons of the published tariff rates for road-haul transportation, in violation of section 6 of the Interstate Commerce Act (49 U. S. C. §6). Such violation of section 6, it is then further concluded, in turn causes unjust discrimination and undue preference and prejudice in violation of sections 2 and 3 of the Act.

* Although "cost" is not defined with the certainty required in respect of an order for the violation of which dire penalties may be imposed, it must be inferred from the Commission's reports that "cost" is intended to be comprehensive and to include interest or return upon invested capital, depreciation, taxes and all operating and other expenses chargeable to each lease or service (R. 134, 137, 174-175).

Chairman Mahaffie dissented from the conclusions of the Commission on the ground that the below-cost findings on which they are based are insufficient in law to establish concessions (R. 198).

Appellants filed their bill with the District Court praying that the order of February 2, 1937, be set aside and that its enforcement be enjoined. The basis of the bill is that the below-cost findings made by the Commission do not establish the existence of concessions and are, therefore, insufficient in law to support the order (R. 1-24). The Commission's three reports, the challenged order and the evidence taken by the Commission were put in evidence at the hearing before the District Court, and on August 25, 1937, its opinion was handed down dismissing the bill. An order was entered on November 1, 1937, staying the enforcement of the Commission's order pending appeal to this Court (R. 320). Subsequently, on March 23, 1938, the District Court adopted its findings of fact, in the exact language in which they were submitted by appellees, and sixteen conclusions of law, and on that date entered its final decree of dismissal (R. 406). From the final decree appellants have appealed directly to this Court pursuant to Title 28, U. S. C., §345.

Appellants' position on this appeal is that the findings made by the Commission, taken at their full face value, are insufficient in law to sustain the order. Appellants' assignments of error are all to this effect (R. 407). They have not deemed it necessary to assign any errors with respect to the sufficiency of the evidence to support the Commission's findings and, therefore, the evidence is not included in the printed record on appeal (R. 413-415). Appellees have deposited the original exhibits and testimony before the Commission with the Clerk of this Court in their original form, and at their request it has been stipulated that the same may be referred to by either party (R. 423, 428). Appellants submit, however, that such exhibits and testimony have no bearing whatever upon the issues of law presented by this appeal (R. 427).

IV.

Specification of Errors.

Appellants make the following specification of the assigned errors they intend to urge:

The District Court erred:

1. In holding that the findings of the Interstate Commerce Commission, that appellants' leasing of warehousing space to lessees, permitting the use of such space by and their rendition of services to the public at less than "cost" to appellants, are sufficient in law to establish that appellants thereby make "concessions" and are guilty of unlawful discriminations and prejudices in violation of sections 2, 3 and 6 of the Interstate Commerce Act (U. S. C., Title 49, Ch. 1).

2. In failing to hold that the Commission should have found that appellants, as a matter of law, may be guilty of making concessions, discriminations and preferences, in violation of sections 2, 3 and 6 of the Act, in connection with the leases, rentals and services referred to in said order of the Commission, only if and to the extent that appellants may be found to make leases or render services at less than the reasonable worth thereof; such reasonable worth being ordinarily measurable by the prevailing market values.

3. In holding that the findings made by the Commission and described in appellants' petition are sufficient in law to support the Commission's cease and desist order of February 2, 1937.

4. In holding that appellants in making leases and rendering services at prevailing market values, are nevertheless guilty of making concessions, in violation of sections 2, 3

and 6 of said Act, if such prevailing market values are less than the "cost" to appellants of so doing.

5. In holding that although appellants have published and observed tariffs covering "in-transit" storage, handling and other services rendered by appellants in connection with goods that are in process of transportation over appellants' railroads, appellants may never the less be guilty, as to such services, of violations of sections 2, 3 and 6 of the Act, as found and concluded by the Interstate Commerce Commission.

6. In failing to hold that by publishing and observing tariffs covering "in-transit" storage, handling and other services rendered by appellants in connection with goods that are in process of transportation over appellants' railroads, appellants, as to such services, may not, as a matter of law, be guilty of violations of sections 2, 3 and 6 of the Act.

7. In failing to hold that said "in-transit" storage, handling and other services, for which rates and charges are and must be published by appellants in tariffs duly filed, and uniformly collected, are transportation services as defined in said Interstate Commerce Act, and that appellants' acts in compliance with said published tariffs cannot, as a matter of law, constitute concessions from appellants' published tariffs covering their line-haul transportation, in violation of sections 2, 3 and 6 of the Act.

8. In failing to hold that said order of the Commission, in that it does not permit appellants to make leases of their property and render services at the reasonable worth thereof as ordinarily measured by the prevailing market values, but instead imposes upon appellants observance of a "cost" standard not found by the Commission to have any relation to reasonable worth or prevailing market values, takes the property of appellants without due process of law and for

public use without just compensation, and deprives appellants of their liberty, in violation of the Fifth Amendment to the Constitution of the United States.

9. In failing to hold that the Commission was without authority to make the order of February 2, 1937, complained of in appellants' petition herein, because (a) the reports which are made a part of the order do not contain findings requisite to support the order, (b) the findings which the reports contain are erroneous in law, and (c) the said reports are arbitrary and contrary to previous decisions of both the courts and the Commission upholding the right of common carriers by railroad to lease property to shippers at reasonable rentals ordinarily measured by currently prevailing rentals.

10. In making and entering its final decree dismissing appellants' petition.

V.

ARGUMENT.

Summary of Argument.

1. The challenged order of the Interstate Commerce Commission condemns railroad leases to shippers upon the basic finding and ground that the rentals therein reserved are less than the cost of providing the property leased. Upon this finding alone the Commission and the District Court hold that such rentals are "concessions" to shippers from the published tariff rates for road-haul transportation, in violation of sections 6, 2 and 3 of the Interstate Commerce Act (49 U. S. C., §§ 6, 2, 3), and "probably" in violation of the Elkins Act (49 U. S. C., § 41(i))*. The order must stand or fall

* The relevant portions of these sections of the statutes are printed in the appendix, pages 46 to 49.

upon this finding, as it is neither the duty nor within the province of the Court to search the record to determine whether additional essential findings might have been made.

2. A finding that the rental in a railroad lease of real property to a shipper is below the "cost" to the railroad of providing the property leased is legally insufficient to constitute a section 6 concession to the lessee-shipper because it does not show that the shipper who pays such below-cost rental in fact receives greater value from the railroad in the form of the leasehold than he pays back in the form of such rental. *Receipt, by the shipper of more value than he pays back must be shown before a concession can arise*, and that can only be shown by an express finding, which the Commission has not made, that the reasonable rental value of the lease given to the shipper exceeded the rental he actually paid. Because of that deficiency in findings the order is void as to leases.

3. The only finding that the Commission made as to appellants' storing of freight in their warehouses and piers is likewise that the charges therefor are less than the cost to the carrier of storing such freight. As to such storage that finding is, for the same reasons, insufficient to establish a concession.

4. All of appellants' "in-transit services", consisting of in-transit storage and the handling and insuring of goods in connection therewith, are covered by tariffs, and, under the Commission's express finding, must continue so to be. Appellants' full compliance with such tariffs, which is admitted, makes the existence of concessions in connection with such "in-transit services" impossible.

5. The order as to appellants' leases, storage, and "in-transit services" will, unless it is set aside and its enforcement is restrained, deprive appellants of their liberty and property in contravention of the Fifth Amendment.

POINT 1. ¶

The Commission's order is void as to appellants' leases of real property to shippers because the basic finding upon which it rests—that the rentals in said leases are less than "cost" and therefore constitute "concessions"—is insufficient in law to support the order.

The question squarely raised is whether a bare finding that the rental reserved in a lease of railroad property to a shipper is less than cost is sufficient to establish the receipt by such shipper of a concession from the published tariff rates for road-haul transportation, in violation of section 6 of the Act. There is no claim by anyone that appellants have failed to collect full tariff rates or have made any direct refund of any part thereof to anyone.

A.

The Commission's basic finding as to leases is that the rentals therein reserved are below cost; the order must stand or fall upon that finding.

It is settled law that an order of the Commission is void unless it is supported by clear and express findings of all the facts that condition the Commission's power to make the order. In the language of Mr. Justice Cardozo in *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454."

Referring to the ruling in *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59, this Court said in *Mahler v. Eby*, 264 U. S. 32, 44:

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the *express finding* in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government." (Italics supplied.)

Nor is a broad general conclusion by the Commission in the words of the statute a sufficient finding for, in the same case, Mr. Justice Cardozo said (p. 506):

"The statement in the second of these paragraphs (of the findings of the Commission under review) that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding *unless supported by facts more particularly stated*. Cf. *Florida v. United States*, *supra*, at p. 213; *Southern Pacific Co. v. Interstate Commerce Comm'n*, 219 U. S. 433, 449." (Italics supplied.)

The only basic finding by the Commission as to leases is that the rental reserved is below the cost to the railroad of providing the property leased. There are no other relevant findings, and, in particular, there is no finding that the rental reserved in any of the appellants' leases was less than the fair and reasonable rental value of the leasehold interest. This is established beyond dispute by the findings in regard to the lease of the Central Railroad of New Jersey, *supra*, page 5, which are typical of the findings made as to the leases of all the appellants.

The whole substance of these findings is simply that by leasing property at non-compensatory rentals, i.e., at rentals "which fail to compensate said railroad for its cost in providing" the property, the railroad "grants concessions" to the lessee-shippers, and "reduces below the published tariff

rates the transportation charges" paid by said shippers. This claimed reduction is the section 6 violation referred to in the challenged order. Having in this way concluded that a below-cost rental is *ipso facto* a concession that violates section 6, the Commission declares that other violations of law follow from the concession conclusion, for it says in the findings, *supra*, page 5, that "by granting such concessions" the railroad is guilty of the unjust discrimination and the undue and unreasonable preference and advantage which are found to violate sections 2 and 3 of the Act. Thus, the section 2 and section 3 violations found as to leases are those flowing from the asserted concessions, or section 6 violations, which in turn arise solely from the below-cost rentals.

If anything further is needed to show this, it is to be found in the way the District Court stated and treated the issue. Referring to the Commission's findings, that Court declared* that "the indirect violation of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6) by the forbidden practices has been found in that those permitted to receive such *below cost*† services in effect move their goods at less than tariff rates and receive preferential treatment in violation of section 3 (49 U. S. C. A. Sec. 3)". Again it stated that, "The power to make the order, therefore, depends upon whether the providing of such services as were found to have been furnished for *less than cost* violates the act in that some shippers are given more favorable treatment than others in like situation". It then declared that, "To the extent that such *cost* is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carriers' loss had been paid. And this is so whether the voluntary commercial services performed by the carriers * * * are charged

* 20 F. Supp. 273, 276.

† All italics supplied.

at their *fair value* or not. If the carriers sustain losses in performing voluntary commercial services for shippers * * * it can make no difference, in the effect of such practices on the tariff rates, that the voluntary commercial services were charged at their *fair value* if that happens for whatever reason to be less than the *cost* to the carriers. To the extent that the carriers are out-of-pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut * * *". "That is the vice", the Court continued, "the order is designed to do away with and it will not be cured if the *fair value* standard is substituted for the *cost* standard in respect of commercial services * * *. If the *cost* to the carriers of the inducing commercial services performed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the act follow as surely whether the commercial services are charged at their *fair value* or not. In other words, *fair value* is immaterial except on the question of efficiency in connection with the determination of loss".

While the foregoing extracts do not in terms specifically mention railroad leases to shippers at below-cost rentals, it is clear from the whole opinion that those extracts were intended to comprehend all the practices condemned by the order, for the Court concludes: "So we agree with the Commission that the condemned practices do violate the act and hold the order supported by the findings and generally within the scope of the Commission's power".

Should it be urged that some statements in the Commission's long and discursive reports may be accepted as findings in addition to the below-cost finding, "the difficulty is that it [the Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences." *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 510.

All that the Commission has said "with simplicity and clearness" is that rentals are below cost, and on that specifically is the order based. Quasi-jurisdictional facts, or, as the Court described them at page 510 in the opinion just cited, "the facts that control the validity" of the Commission's order, must be expressly found. They cannot be supplied by implication or inference, nor will the Court search the record to supply missing essential findings. This is the rule, even though the Court examining the statements of fact in the Commission's report, "would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning." *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 510.

The settled law, declared by this Court in *Florida v. United States*, 282 U. S. 194, 215, is that,

"In the absence of such findings (the basic or essential findings required to support the Commission's order), we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

And again in *Atchison T. & S. F. Ry. Co. v. United States*, 295 U. S. 193, 201, it was squarely decided that an order of the Commission must stand or fall upon such findings alone as that body makes to support it, and that the Court will not search the record to ascertain whether the additional necessary findings might have been made. In stating this principle the Court said of the Commission's report and order there in issue:

"* * * Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements

in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States*, 282 U. S. 194, 215. Recently this Court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication". Citing *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86. *Interstate Commerce Comm'n v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 341.

The same principle governs the determination of the validity of the orders of other administrative tribunals. In *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, 206; this Court held that:

"The Court of Appeals is without power on review of proceedings of the Board of Tax Appeals to make any findings of fact. The function of the court is to decide whether the correct rule of law was applied to the facts found; * * * If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. *And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the records.*" (Italics supplied.)

In the instant case the Commission has not found that the rentals reserved in the appellants' leases were less than the fair rental value of the leasehold interests; and the lower Court held* that "fair value is immaterial". As presently will be shown, this is the basic, quasi-jurisdictional fact that conditions the power of the Commission to declare the existence of a concession in connection with such leases. Under the doctrine of the decisions just reviewed that fact can-

* 20 F. Supp. 273, 277 (R. 309)

not be supplied by inference or implication. The order, therefore, must stand or fall upon the below-cost finding alone without benefit of any other findings the lower Court may have undertaken to spell out and make from the evidence before the Commission.

Moreover, the "cost" standard is specifically imposed by the Commission's order itself, appellants being forbidden to make leases at less than "cost". It follows, *a fortiori*, that no statement in the Commission's reports or in the lower Court's findings, other than the below-cost finding, may be considered. Even if the Commission or the lower Court had found facts which would support an order made upon some other legal theory, those facts could not support the present order because that order on its face *excludes* all except the "cost" theory.

Appellants contend, therefore, that the sole issue now before this Court as to appellants' leases is the sufficiency of the below-cost finding which the Commission made and with which alone the lower Court dealt in its opinion.

B.

The finding that the rental in a railroad lease of real property to a shipper is below "cost" is insufficient in law to establish a "concession".

The fundamental fallacy in the decisions of both the District Court and the Commission is the holding that there can be such a thing as a concession to a shipper that will cut the published tariff rates for his transportation in violation of section 6 without a finding that the shipper really got something of value that he did not adequately pay for. It is not what it may cost the carrier to give to the shipper what he got, but rather what the thing given was reasonably worth at the time and how that worth compares with what the shipper paid, that are significant. If the recipient is found to have given less than the fair value

of the thing received then in truth has something been conceded to him. But until it is found as a fact that what the recipient got from the railroad exceeded in value what he gave in exchange the recipient plainly has no excess value that he can apply as a credit against the tariff rates, and the indispensable element of a concession is wanting.

Applied to this case and stated briefly, this means that in order to establish a concession arising out of appellants' leases to shippers it must be found clearly and expressly that the lease in each instance had a fair rental value (as measured by the prevailing market and other relevant facts) in excess of the amount of rental the shipper actually paid. In no other way can it rightly be held that there was a concession. That indispensable finding is wholly lacking.

The courts have continuously held that, before there can arise a concession in diminution of a published tariff rate for transportation, it must be made to appear that some element of value is given by the carrier over and above what the recipient shipper gives in return. The concession exists only by reason and to the extent of the excess value the shipper receives. This sound principle permeates and characterizes the decisions.

Payments "made by a carrier to a shipper in consideration of his shipping goods over the carrier's lines" were held to be concessions that cut "its published rates on file" by this Court in *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, 446. In that case the things of value the shipper received, for which he did not pay and which measured the concession, were the money payments from the carrier, it being held that the shipper's act of shipping, which was the consideration recited, was not in law a good consideration.

In *Wight v. United States*, 167 U. S. 512, a carrier, whose published rate covered only the haul from Cincinnati to its yard in Pittsburgh, undertook without further charge to dray the freight from its yard to the consignee's place of business, and later to make an allowance to the consignee for doing

the draying. It was held that this drayage service, being a thing of value given by the carrier beyond the scope of its transportation duty, and for which the consignee paid nothing, amounted to a concession from the tariff rate for the line-haul service, to the extent of the worth of the drayage. It thereby produced unjust discrimination between the consignee who got the concession and one who did not. In its opinion in *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247, 260, this Court observed, with respect to the situation presented in the *Wight* case, that, "Paying the favored consignee for rendering a service the carrier was not bound to furnish, was a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute * * *." It was this "gift" of something of value for which nothing was given in return that was the essence of the adjudged concession.

The *Mitchell Coal Company* case, just mentioned, is one in which this Court dealt with the question whether allowances by a carrier to coal mining companies for "bringing their coal over the spur track to the junction" were unlawful rebates or concessions from the tariff rate which, it was found, covered the entire haul from the mines, including the haul over the spur track. In holding (p. 263) that the allowances were lawful "only when supported by a consideration," and (p. 265) that "They became unlawful only when unreasonable," i.e., too high for what the shipper did in exchange for the allowances, the Court was but giving full effect to the principle, here under discussion, that *there is and can be no concession that cuts the tariff rate until it is affirmatively found that something of value moves from the carrier to the shipper in excess of that which the shipper gives back in return*, or, as stated in the syllabus, "unless and until there has been a finding by the Interstate Commerce Commission that the payments so made to the other shippers were unreasonably large."

Only recently this principle was again affirmed in *United States v. American Tin Plate Co.*, 301 U. S. 402, wherein this Court upheld an order of the Commission that con-

condemned a carrier's performance of car spotting service, or payments to the industry for performing such service, beyond the point where the line-haul service covered by the tariff began or ended. This performance of or payment for the spotting service, which the carrier was not required to perform under the tariff rate for transportation, was the thing of value given by the carrier, for which the shipper gave nothing in return, that constituted and measured the concession in violation of section 6 of the Act.

In the lower federal courts also there are many well considered decisions uniformly holding that concessions arise only because and to the extent that the facts show receipt of more value by the shipper than he gives back to the carrier in return.

Davis v. Southern Pacific Co., 235 Fed. 781, 737, is one wherein the lower court condemned as concessions agreements between a carrier and all hop growers indiscriminately, whereby in consideration of their hop shipments over the carrier's railroad from San Francisco to the East at the full tariff rate for that transportation the carrier would "reimburse them for all local charges in the way of local freights, cartage, warehouse, and similar charges necessary to transport such freight to the port of San Francisco, * * *." The manifest concession from the tariff rate for the haul east from San Francisco arose from the fact that each hop shipper definitely got something of value from the carrier for which he did not pay at all, namely, the local carriage, cartage and warehousing incident to getting his hops into San Francisco preparatory to their movement east. It was those things of value given by the carrier, without any charge at all, that constituted the unlawful concession.

The decision of the Circuit Court of Appeals, Second Circuit, in *Aron v. Pennsylvania Railroad Co.*, 80 F. (2d) 100, (certiorari denied, 298 U. S. 658) is particularly in point. The action there was by a livestock shipper to recover from the carrier certain unpublished and unfilled charges paid to the carrier for the service of unloading and reloading live-

stock in transit for rest as required by the 28-Hour Law, 48 U. S. C., §§71, 72. After declaring that these services were "transportation", the court went on to decide that the shippers "did not, as they contend, suffer damages in the entire amount paid, but only insofar as the amount charged exceeded a *reasonable rate for the service rendered*" by the carrier, and further that, "The determination of damages in the instant case involves a *finding of a reasonable rate*, and the court will not determine that question without a prior finding by the commission". (Italics supplied.) If it is the law that a determination of damages in such a case, where it is claimed that the carrier charged too much for the service rendered, necessitates a preliminary finding by the Commission as to the reasonable value of what the carrier gave the shipper, a like finding of reasonable value can be no less required in the converse situation where, as here, it is claimed that the carrier gave a rebate by charging too little for the leasehold given the shipper.

There remain to be considered the cases upon which the Commission and the lower Court specifically relied, viz., *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849; *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292; *Vandavia Ry. Co. v. United States*, 226 Fed. 713, and *New York N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361. Instead of supporting the order we submit that each of these cases condemns it.

In the *Hirsch* and *Blount* cases railroad lessors sued to set aside certain leases to shippers upon the express admission and allegation that the rentals were unlawfully low; being in the *Hirsch* case "more than \$2000 less than its true rental value" (204 Fed. 849, 852); and in the *Blount* case "grossly less than the fair and reasonable rental value of the premises" because no rental at all was specified (238 Fed. 292, 294). Upon facts showing so definitely that each shipper-tenant got from the railroad a leasehold having value substantially in excess of the rental given in return by the ship-

per, the unlawful concessions found by the Circuit Courts are obvious.

The *Vandalia* case is one where a coal company got a loan from a railroad company at 2%, although the railroad company itself contemporaneously borrowed and paid 4% on the money loaned and, as the opinion shows, the 2% rate "was far below the market rate", and the coal company "was not in a position to borrow it at 2% as a regular banking proposition or from any ordinary sources". It would be difficult to conceive a factual situation more clearly showing that what the shipper received had a value substantially in excess of what he gave in return. It was the excess of value received in the form of a loan, reasonably worth 4% but for which the shipper paid only 2%, that constituted and measured the concession.

The *New Haven* case (200 U. S. 361) was accepted by the Commission and the District Court as authority requiring adoption of the cost standard and, therefore, calls for particular analysis. Concerning that case that Court said, "In any event, we think the cost basis has been approved by authority which binds us" (20 F. Supp. 273, 276; R. 306). Appellants cannot too strongly urge the error of such an interpretation of that decision.

The facts were that the Chesapeake and Ohio Railway Company contracted to buy coal from mines on its line in Virginia and, at the same time, further contracted to sell and deliver the same coal to the New York, New Haven and Hartford Railroad Company in Connecticut at a delivered price of \$2.75 per ton. This price was less than the cost of the coal to the Chesapeake and Ohio at the market price at the mines plus the rail tariff charges and water transportation costs to Connecticut.

The question decided in the *New Haven* case was stated by the Court at page 390 as follows: "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the

cost of purchase, the cost of delivery and the published freight rates?" As thus stated, the question manifestly relates to a contemporaneous transaction of purchase and sale of chattels. In such a transaction the cost of the commodity ordinarily would be its then fair market value; and that the Court so regarded cost in the *New Haven* case is apparent from its use interchangeably of the terms "cost" and "market price" (Opinion, pp. 384, 388).

Cost and fair market value being the same, it obviously follows that an immediate resale of the same commodity by the carrier to a shipper, and its transportation for the shipper, all for a total price less than the cost [fair market value] of the commodity plus the tariff rate for the transportation, is simply another exemplification of the principle of the cases already cited. That is, it shows that the shipper got from the carrier a total value [goods at their market value, plus transportation] in excess of the value he gave in return.

The significant fact in all this is that the cost of the goods was the equivalent of their fair market value, and this fact was wholly disregarded by both the District Court and the Commission. In the instant case, on the contrary, the carriers' transactions of acquiring and investing in the real estate leased to shippers were not contemporaneous with the lease transactions. For example, in the case of the lease of the Newark Warehouse by the Central Railroad of New Jersey, which is specifically referred to in the Commission's order (R. 274, 234-235) the carrier's investment was made in 1906 while the lease was made in 1934—twenty-eight years later. Nor has the Commission found *aliunde* the fair market value of any of the leases at the time they were made. There is in the instant case, therefore, nothing by way of finding or otherwise to identify cost with fair market value of the leases.

Furthermore, it should be noted that the delivery price of \$2.75 per ton, in addition to being less than the cost or market value of the coal at the mines plus transportation

charges, was also less than the market value of the coal in Connecticut. This fact is indicated by the recital on page 388 of the Court's opinion that in 1900 and again in 1902 when the Chesapeake and Ohio failed to make deliveries according to schedule under the 1896 contract, the New Haven Railroad "bought coal in the open market" to make up the shortage. It paid in 1900 \$160,000 and in 1902 approximately \$103,000 more for the then undelivered quotas than the contract price, and made damage claims for these amounts against the Chesapeake and Ohio. It may fairly be inferred from these facts, and it appears from the record in the case, of which this Court will take judicial notice *National Fire Ins. Co. of Hartford v. Thompson, et al.*, 281 U. S. 331, 336, that early in 1903 at the time of the contract in question, the same difference between the Connecticut market price and the contract price continued to prevail.

This undeniable excess of value over the contract price, whether measured by the cost or market value at the mines or the market value at destination, brings the *New Haven* case squarely within the principle of the other cases above cited by showing beyond question that the Chesapeake and Ohio, as the vendor-carrier, gave to the New Haven, as the vendee-consignee, substantial value in excess of what the New Haven paid in return. It was this excess of value received by the railroad patron over and above the value given back by it to the Chesapeake and Ohio that constituted and measured the section 6 concession and the consequent section 2 violation which this Court found in that case.

Moreover, as appears on page 405, this Court's injunction, as it finally issued in the *New Haven* case, significantly did not mention "cost", as does the order here challenged. It merely restrained "the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal". That requirement can only be met by exaction of fair market value, or cost if, as in the *New Haven* case, cost may be taken to be market value, which it cannot be in the instant case.

So, the *New Haven* case, like all the others, is no authority for the sufficiency of the particular below-cost finding here made as to leases.

Further citation of the authorities is unnecessary. Those mentioned suffice to make clear how definitely it is established by controlling precedent that there can be no cutting of the line-haul rate in a shipper's behalf, and consequently a concession in violation of section 6, *unless and until it is found as a fact that the value of what is claimed to be the concession actually exceeds the value of what the shipper gives in return for it.* That essential finding has not been made in this case. All that has been found is that the shipper got a lease for which he paid a rental less than the "cost" to the carrier of providing the lease. That is not enough. It affords no basis at all for comparing what the lessee paid with what the lease was reasonably worth. Until that comparison is made and it definitely stands forth upon the face of the express findings that the shipper-lessee got more than he paid for, the findings fall short, under the unbroken line of authorities cited, of showing a concession.

The error of the lower Court and of the Commission lies in their treatment of the matter solely from the standpoint of what it cost the carrier, upon the basis of its investment in the property, to give the lease, rather than from the correct standpoint of what was the reasonable value of the leasehold the shipper received in comparison with what he paid.

Cost to a lessor of such a thing as real property in which the element of time of ownership and circumstances and amount of former investment play such an important part, has not been shown either by the lower Court's opinion, the Commission's findings, or by any human experience of which this Court may take judicial notice, to have any fixed or ascertainable relation to the reasonable value of a leasehold subsequently made under different conditions in the real state market. On the contrary, the absence of any such relation is clearly recognized in the decision of this Court in *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, 155.

where it was squarely held that "market value" at the time of loss, rather than cost, is the measure of damages for loss of a vessel. And "in view of changed prices" (p. 157) between the dates of construction and loss of the vessel [just as in the instant case between the dates of original investment in and lease of the property] the Court affirmed that, "the original cost of the vessel was not useful as a guide to her value when lost".

Mr. Justice Brandeis well stated the same lack of relation between cost and fair value in his dissenting opinion in *St. L. & O'Fallon R. Co. v. United States*, 279 U. S. 461, 494, when he said:

"* * * It is common knowledge that the current market values of many office buildings and residences constructed prior to the World War have failed to reflect the greatly increased building costs of recent years, although the need of new buildings of like character was being demonstrated by the large volume of construction at the higher price level. Many railroads built before the World War have never been worth as much as their original cost, because high construction cost combined with adverse operating conditions and limited traffic have at all times prevented their earning, despite reasonable rates, a fair return on the original cost."

There is nothing strange or unusual in the circumstance that present fair value of leases may not equal "cost", if calculated to include, as the Commission's reports seem to contemplate, interest and depreciation on investment at some *unstated* rates, and taxes. As an example, it was the common opinion when the Transportation Act, 1920, was enacted that actual values of railroad property were less than the costs reflected in the property investment accounts. 59 Cong. Rec., Part 1, pp. 126, 135-136, 224, 228, 905. In the instant case also, the Commission's reports show (R. 56, 70, 77, 88, 170) that most of the buildings in which the carriers have leased space to shippers were constructed in the years after the war and prior to the depression when, as the Court

will judicially notice, price levels and all property values were materially higher than have prevailed since the collapse, when the leases here in issue were made. *A. T. & S. F. Ry. Co. v. U. S.*, 284 U. S. 248, 260; *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135, 149.

Proceeding further upon the unsound cost theory, the Court below went so far as to hold that a loss due to leasing property at a rental below cost necessarily reduces, by the amount of the loss, the carrier's "true net transportation return" from the tariff rates for transportation charged the shipper, and that such loss is automatically and correspondingly a gain by the shipper. Simply stated, the argument is that every railroad loss or reduction in "net transportation return" is somebody's concession or rebate. To state the proposition, we submit, is to disclose its fallacy.

A carrier may dissipate its revenue derived from the tariff rates on a given shipment in many ways. But mere dissipation cannot constitute a concession. Unless the loss sustained by the carrier also has the effect directly or indirectly of giving the shipper something of value over and above what he pays, there is, and in the very nature of things can be, no reduction in the tariff rates paid by the shipper, and therefore no concession from the standpoint of the shipper. It is not what the carrier retains as a net transportation return, but what the shipper pays, in relation to what he gets from the carrier, that determines whether or not the shipper has paid and borne the full tariff rate. It is not what the carrier loses, but what the shipper gains, if anything, from the lease, that controls. And the shipper does not receive anything of value which reduces the tariff rates that he pays, if in the lease transaction he pays as a rental the fair and reasonable current rental value of the leasehold interest. The cost can affect the carrier's loss, but only the present fair rental value can determine the shipper's gain as measured by the rental paid.

No one, of course, would contend that there could be a concession or rebate where the "net transportation return"

is either reduced or even wiped out entirely by reason of paying the shipper's proper damage claims, or by reason of accidents or other transportation conditions which so increased the cost of the carrier's service as to leave no net return on the particular shipment. Conversely, would anyone be so rash as to claim that there would be no concession in a lease by a carrier of valuable land to a shipper rent free because, due to a former land grant, it had cost the carrier nothing? Yet such would be the logical and necessary consequences of the lower Court's and Commission's cost theory.

The fallacy of the cost rule laid down by the Commission and upheld by the lower Court will perhaps appear even more plainly if we apply it to the sale of real property by a carrier to a shipper. Clearly a carrier has a right to sell surplus real property to a shipper for a consideration measured by its present market value. It cannot in reason be contended that the shipper receives a rebate because he is not required to pay what the property cost the carrier, if that is more than the property is worth at the time of sale. In the application of the principle here involved, we submit, a lease of real property cannot be distinguished from its sale.

In seeking to continue to make leases of real property to shippers and others on the basis of the current fair rental value of the leasehold interest, appellants are not asking for any *new* rights or privileges or for any *change* in the existing law. From the beginning of railroad history in this country rail carriers have continuously exercised the right to make leases on the basis of current fair rental value, and in so doing have uniformly been upheld by the decisions of this Court and other courts, as well as by the Commission itself. Such leases have met with approval even though the lessees, by reason of the proximity of the leased property to railroad stations, have had thereby certain advantages over other shippers who were unable to secure such leases. *Donovan v. Pennsylvania R. Co.*, 199 U. S. 279; *Louisville & Nashville Ry. Co. v. West Coast*

Naval Stores Co., 198 U. S. 483; *Missouri-Pacific Ry. Co. v. Nebraska*, 164 U. S. 403; *Andrews Bros. Co. v. Pennsylvania R. Co.*, 123 I. C. C. 733; *Williams-Thompson Co. v. A. & W. P. R. Co.*, 126 I. C. C. 417; *Johnson, etc., Lumber Co. v. Union Pacific R. Co.*, 219 I. C. C. 125.

The right to lease at rentals measured by current rental value is plainly recognized in this Court's statement in *Interstate Commerce Commission v. Chicago Great Western R. Co.*, 209 U. S. 108, 119, that, subject to the prohibition of the Act against discrimination and preference and its requirement for reasonable charges, carriers are free, as at common law, "to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits".

The Circuit Court of Appeals, Sixth Circuit, in *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849, so much relied upon by the Commission and the Court below, was careful to point out that, "This [the power of Congress under the Act to denounce concessions] in no wise militates against the right of a carrier to let or permit the use of its property at a reasonable rental". The Circuit Court's frequent references to "rental value", "rental value of its property at the date of the" lease, "rental value, not reserved", "excess in rental value", and "excess in rental value over the rent reserved", are all in full recognition of the right to make leases at the fair and reasonable rental value of the leasehold.

So also in *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292, 296, the Circuit Court of Appeals, Fifth Circuit, applied the rule of "reasonable adequate rental".

United States v. Northern Pac. Ry. Co., 18 F. (2nd) 295, 304, is particularly illuminating in this connection because the District Court therein reaffirmed the right of carriers to make leases at "the fair and reasonable rental value of the property." The Court further pointed out that "The reasonableness of the rents involves questions of fact rather than of law", and that where a group of leases is involved,

as in the instant case, they cannot be properly combined for wholesale treatment as the Commission has done. Instead, the Court said that the leases "differ materially in important details having direct bearing on the reasonableness of the rentals reserved, and each case will have to be considered separately in the light of its own peculiar facts. It is not possible to consider the leases *en bloc* and determine the reasonableness of rentals in any general or abstract way."

The right to lease at fair rental values is also sanctioned in the Commission's settled administration of the Act. After a general investigation of the whole subject in *Leases and Grants By Carriers To Shippers*, 73 I. C. C. 671, 683, involving the same leases as were dealt with by the Court in the case just referred to, the Commission endorsed the reasonable rental value standard in its conclusion stated as follows:

"We shall go no further in this report than to indicate some of the underlying principles which, in our opinion, should govern carriers in the leasing of lands to shippers and which are illustrated by the evidence which has already been summarized:

"1. No justification exists for the leasing of railway lands to industries at a nominal rental charge.

"4. *Every effort should be made by carriers to obtain, when leasing land to shippers, terms no less favorable than would be obtained, under similar conditions and restrictions of use, were the land owned independently of the railroad.*" (Italics ours.)

Again in *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 692, the Commission declared:

"That every effort should be made by carriers when leasing their warehouses to shippers to obtain terms no less favorable than would be obtained, under similar restrictions and conditions of use, were the warehouses owned independently of the railroad."

Can it be that these long-standing precedents are now to be overturned by adopting the rule that rentals must conform to cost, in total disregard of the current rental value of the leasehold, or else be condemned as concessions in violation of section 6? Is cost to be the standard when, as shown, the lessor's cost in no way measures the amount of leasehold value the lessee receives?

If the cost standard were in fact a means necessary to prevent concessions to shippers, appellants could not, of course, be heard to complain. But it is definitely not such means. On the contrary, the imposed cost standard would itself be a cause rather than a cure of concessions. The command that it be observed will create a dilemma upon one or the other horn of which appellants cannot escape impalement. On the one hand, when cost is less than current fair rental value of the leasehold, as we have shown it may well be, a lease at cost is bound to be a concession. If cost is, for example, fifty cents per square foot computed upon some prior low investment, while the fair rental value in the prevailing market is sixty cents per square foot, a lease at fifty cents, although it covers cost, would unquestionably constitute a concession of value to the lessee to the extent of ten cents per square foot. If it should be suggested that in such circumstances the carrier would be compelled by law to observe the higher fair rental value rather than cost, the answer is that such a suggestion conclusively demonstrates the fallacy of the whole cost rule. If cost cannot control when fair rental value is higher, by the same token it cannot control when fair rental value is lower, than cost.

The other horn of the dilemma would threaten when cost exceeded the fair rental value in the prevailing market. Observance of the cost rule then, as required by the order, would be a complete bar to any leases. Prospective tenants would not pay higher than the fair rental value established by the prevailing market, and appellants would suffer total

deprivation of the use of their property, with no offsetting benefit of any kind to any one.

All this unlawfulness and uncertainty are avoided by continued adherence to the sound and workable doctrine that leases may be made on the basis of the fair rental value of the leasehold, as determined by current market prices and other relevant facts. Such a standard preserves absolute equality among shippers in so far as leases are concerned, and gives to them no concession whatever for the reason that what they pay is the equivalent of the fair rental value of the leases they receive.

The challenged order will have a most vital and revolutionary effect, not only upon appellants, but upon all railroads throughout the United States, in connection with their right, heretofore universally recognized, to make leases for reasonable market rentals. The far-reaching effect and hardship to the shippers and carriers of the whole country of the adoption of a rigid cost or investment standard as the test of lawful rentals, without any requirement for finding or even considering fair rental value, are incalculable.

Railroads not only now have properties that must be leased in the interest of efficient and economical operation, but in the normal course of their business other leasable properties necessarily will be acquired through the lifting of sidetracks, the abandonment of unnecessary branches, the requirement to purchase properties larger than necessary for the elimination of grade crossings and otherwise. If the leasing of these properties is to be prohibited except upon a cost basis, rather than fair rental value, it is self-evident that many properties purchased or acquired during the last twenty years, particularly prior to the depression, cannot be leased at all, for no one will pay a rental based upon cost when that rental exceeds the fair rental value. Appellants' prayer therefore is that this Court hold null and void the impossible and unworkable order of the Commission that rigidly imposes the cost standard.

POINT 2.

The finding that appellants store goods for shippers at less than cost is insufficient in law to establish a concession; and the Commission's order based thereon is void.

Several appellants, either directly or through subsidiary companies, provide facilities and themselves store the goods of shippers. When the storage is of goods in the course of rail transportation it is known as in-transit storage, and the rules and regulations under which it is performed, together with the charges assessed therefor, are all contained in tariffs duly filed and admittedly observed by appellants (R. 108, 305). When, on the other hand, the storage is of goods not in course of rail transportation it is known as non-transit or commercial storage, and the regulations and charges therefor are not required to be and are not published in tariffs. The tariff aspect of the in-transit storage will be dealt with in Point 3. What is here said about it and non-transit storage relates to the insufficiency of the below-cost finding.

The Commission's finding with respect to appellants' performance of both the in-transit and the non-transit storage is exactly the same as its finding with respect to their leases, namely, that they are performed at charges that are less than cost (*ante*, p. 5). This asserted below-cost character of the charges is what the Commission concluded causes section 6 concessions from the tariff rates for road-haul transportation in favor of the owners of the goods stored who are shippers. By paragraph (b) of the challenged order appellants are therefore commanded to cease and desist from performing all such storage of goods at rates and charges which fail to compensate them "for the cost of so doing".

All that has been set forth under Point 1 to show that a below-cost finding as to the rentals in appellants'

leases to shippers does not establish the existence of concessions, likewise shows that a below-cost finding as to appellants' charges to shippers for storage is equally deficient as proof of concessions. As in the case of appellants' leases, there is as to their storage services no finding whatever of their fair and reasonable value at the time they were given to the shippers.

The storage services of appellants are all performed in railroad piers, warehouses and buildings, the cost of which measures the capital charge that is a component element to be included in determining the storage cost. To calculate the cost of these services as required by the order involves, therefore, the use of the same real estate investment or cost as has been shown with respect to leases to be wholly unrepresentative of fair market value. The cost of storage so calculated has not been shown by any finding in this case to have any fixed or ascertainable relation whatever to the fair and reasonable value of the storage performed by appellants for shippers. On the contrary, all that has been said to show the lack of any relation between the cost and value of leases applies with equal force to storage.

Storage services on appellants' real property are not instances of contemporaneous purchase and sale of goods or services as to which, as in the *New Haven* case, the Court may accept cost as the equivalent of fair market value.

The Commission's report and order do not purport to measure appellants' charges for storage services against the fair and reasonable value of those services and, therefore, must be held invalid.

POINT 3.

The storage, handling and insurance by appellants of freight "in transit" are services covered by duly filed and admittedly observed tariffs. The below-cost finding as to such services is insufficient in law to establish a concession and the Commission's order based thereon is void.

Appellants store, handle and assume liability for fire damage to goods of shippers while "in transit" in railroad piers and buildings in the New York Harbor district. These are the services referred to throughout the case as "in-transit" services. The rules and regulations under which these in-transit services are performed and the charges assessed therefor are all contained in tariffs duly published, filed and admittedly observed by appellants as required by the Act (R. 108, 305).

Briefly stated, the in-transit arrangement is a long-standing one whereby westbound freight, for example, from the New York Harbor district, is received by the railroad at a freight station and thence transported to and placed in a railroad warehouse, pier or other facility, generally on the west side of the harbor. A local rate is published in tariffs and collected for this transportation. The freight is held in storage by the railroad, subject to published tariff charges covering the storage and incidental handling. The shipper has the right, at any time within a designated period after the storage begins, to direct the further transportation of the goods to any point in the West at the balance of the through rate; i.e., he gets the same through rate for transportation as he would if he shipped the goods for uninterrupted movement from the origin point in the New York Harbor district to such western destination. When the outbound rail move-

ment from the in-transit storage point occurs the inbound local rate paid at the time the freight went into storage is credited toward the payment of the through rate. Storage and handling charges are, of course, in addition to the charge for the road-haul transportation.* The preservation, during the storage period, of the right to the through rate gives to the freight while stored an "in-transit" status. All rules and charges concerning these services and privileges are published in appellants' tariffs (R. 190, 201, 273).

The Commission's finding with respect to these in-transit storage, handling and insurance services is exactly the same as the finding with respect to leases and non-transit storage; namely, that they are performed at charges less than cost (*ante*, pp. 5-6). The cost of the in-transit storage has the same component element of capital or investment charge for the use of the building or pier as is present with leases and non-transit storage. Therefore, as shown in Point 2, the Commission's order as to in-transit storage is subject to the same defect that is inherent in the order with respect to leases and non-transit storage.

There will now be considered additional defects in the order as it applies to all "in-transit services": storage, handling and insurance. These additional defects exist not only where, as in the case of storage, the element of historical cost of a building enters in, but also; as in the case of handling and insurance, where the historical cost element is lacking.

The asserted below-cost character of the charges for all in-transit services, notwithstanding that they are all published in tariffs admittedly observed, is condemned as causing section 6 concessions; the Commission asserts that, thereby, the shippers get a reduction from the tariff rates for road-haul

* During the storage period, appellants (except the Central Railroad of New Jersey), upon request by the shipper and payment of the additional charges named in the tariff, will also assume, on the stored freight only, liability for loss by fire (R. 39).

transportation. This is made indisputably plain by the statement in the Commission's third report that,

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to said shippers for the transportation of their goods" (R. 271).

By paragraphs (b), (c), (d) and (e) of the challenged order appellants are commanded to cease and desist from performing such in-transit storage, handling and insurance of goods "at rates and charges which fail to compensate them "for the cost of so doing" (*ante*, p. 3).

The Commission in its first two reports (R. 28, 119) and first order (R. 199) held that storage, handling and insurance in connection with in-transit freight were not "transportation" and were not, therefore, lawful subjects of tariff publication. In its third report it reversed itself in this respect and said:

"* * * We find and conclude that respondents are correct in their contentions that such rates and charges should be published in tariffs filed with us, and that we erred in ordering the cancellation of those tariffs on the ground that the services provided by such tariffs are not properly subjects of tariff publication" (R. 271).

This conclusion, that appellants' charges for in-transit services are and should be published in tariffs, is in irreconcilable conflict with the final findings and order that, to the extent appellants get less than cost for the in-transit services, they are guilty of concessions. In finally requiring the filing of tariffs covering in-transit services, appellants submit that the Commission has determined, as under the decision in *United States v. American Tin Plate Co.*, 301 U. S. 402, 408, it was empowered to do, that they are "transportation" services within the meaning of sections 1(3) and 6(1)

of the Act. That conclusion is compelled by this Court's decision in *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, where in pointing out the scope of the "enlarged . . . definition of the term 'transportation'," in the Hepburn Act amendments to the Interstate Commerce Act (34 Stat. 584, c. 3591), the Court said:

"From this and other provisions of the Hepburn Act it is evident that Congress recognized that the *duty* of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the *entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like.*" (Italics supplied.)

A "concession" cannot exist in connection with a "transportation" service covered by a tariff that is uniformly observed. It is a notorious fact that appellants, in common with nearly all other rail carriers in the United States, because of many adverse economic circumstances beyond their control, cannot and do not, at the present time, obtain full "cost", including interest on investment and depreciation, for the transportation services which they are rendering. It cannot in reason be contended that they are extending "concessions" to shippers in all these below-cost operations. The tariff charges are what the law requires and all it permits the carrier to collect. Manifestly no concession can arise from collecting such lawful charges.

It is well settled that a carrier may, under some circumstances, even be *compelled to render for less than cost* services which it holds itself out by published tariff to perform. *St. Louis etc., R. Co. v. Gill*, 156 U. S. 649, 665-666;

Atlantic Coast Line v. North Carolina Commission, 224 U. S. 1, 26-7; *Northern Pacific R. Co. v. North Dakota*, 224 U. S. 585, 600; *Minneapolis & St. L. R. Co. v. Minnesota*, 136 U. S. 257, 268. In *Atchison T. & S. F. R. Co. v. United States*, 203 Fed. 56, 59, the Court stated that a carrier has no constitutional right to a charge for each distinct kind of service which will equal its proportionate share of the entire operating expenses. The following decisions of the Commission are to the same effect:

Louisville & Nashville R. R. Coal and Coke Rates, 26 I. C. C. 20, 29-30;

Stonega Coke & Coal Co. v. L. & N. R. Co., 39 I. C. C. 523, 541-542;

Pacific Lumber Co. v. N. W. P. R. Co., 51 I. C. C. 738, 757;

Constructive Mileage over Poughkeepsie Bridge, 66 I. C. C. 230, 233;

Nebraska Livestock case, 89 I. C. C. 444, 456; and *Rates on Cotton to Gulf Ports*, 123 I. C. C. 685, 702.

The Commission's holding in the instant case that a carrier's failure to get "cost" for an in-transit service is a violation of law, notwithstanding that the tariff charge is collected, is in direct contradiction of a prior decision by it that was affirmed by the District Court in *Alton & S. R. Co. v. United States*, 49 F. (2nd) 414. The carriers there sought to enjoin an order by the Commission requiring them separately to publish, under section 6 of the Act, their charges for refrigeration service on the ground that the charge fixed by the Commission did not, as was admitted, cover all costs incident to that service. In denying the injunction, the Court, affirming in this respect the interpretation the Commission had adopted, held (pp. 427-8):

"To attribute to Congress, in the enactment of section 6 of the Interstate Commerce Act * * * an intention to establish a system of accounting so rigid that any failure to apply to each tariff charge every element of cost and profit which in strict and scientific accounting could reasonably be assigned to that charge, would not only completely ignore the fundamental purpose of Congress in the adoption of section 6, that of advising the shipper of the amount he must pay for the transportation of his freight, but would incorporate into the system of rate making a rigidity entirely inconsistent with the powers conferred upon the Interstate Commerce Commission, and would thus introduce into the system rules which would make difficult, if not impossible, the ascertainment of the proper charges to be assigned to the main line freight rate and to each ancillary charge. Instead of clearing a channel for reasonably intelligent rate making, such construction would introduce artificial obstructions in a channel already sufficiently difficult and tortuous."

The principle that a carrier is not, as a matter of law, entitled to its full cost for every service it performs is in irreconcilable conflict with the decision of the Commission in the instant case. If for each separate service a carrier may not demand full and separate cost, how can it be held guilty of making concessions wherever it fails to get such cost?

It is not essential to our argument that there be a technical determination that the service is "transportation"; it is sufficient that the service is a proper subject of tariff publication, as the Commission has held, *supra*, page 28, and that a tariff covering it has been duly filed and is being uniformly applied. A finding that services may cost more than the tariff charges (or, for that matter, a finding that the services are worth more than the tariff charges) is insufficient to support a conclusion that the shippers for whom the tariff services are rendered without discrimination receive concessions or any other unlawful advantages in connection with such services. The very fact that these services are held out pursuant to tariff, coupled with the lack

of any claim or finding that appellants have failed to collect the tariff charges, means that these services are uniformly open and available to the entire public on the one common basis stated in the tariff. In these circumstances there is no violation of law unless it is additionally shown that the tariffs actually operate in some unlawful manner. There is and can be no such showing with respect to the in-transit tariffs here in question.

Section 6 of the Act is not violated, because that section merely requires that all charges shall be published in tariffs and that such tariffs shall be uniformly observed and that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

There can be no violation of the Elkins Act because the thing condemned by it is departure from published tariffs, which obviously does not happen, since there is no assertion that appellants are not collecting their tariff charges for the in-transit services. The contrary is admitted.

Section 2 of the Interstate Commerce Act is not violated, for it condemns the collection from one person for any service of "greater or less compensation" than is collected from another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions". The essence of this section is that it prohibits the collection from two shippers of different charges for the same service. *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263; *Wight v. United States*, 187 U. S. 512. Here, the tariff charges are collected from all. The Commission, by Chairman Cooley, established the principle, in one of the early cases under the Act, that section 2 is not violated when tariff provisions are equally available to all. *Crews v. Richmond & Danville R. R. Co.*, 1 I. C. C. 401, 1 Int. Com. Rep. 703, 712.

The same principle was followed in *Martin v. Chicago B. & Q. R. Co.*, 2 I. C. C. 25; *American Round Bale Press Co. v. Atchison T. & S. F. R. Co.*, 32 I. C. C. 458, 462; *Wells & Son v. Chicago B. & Q. R. Co.*, 161 I. C. C. 145, 148. That "impartiality and publication" satisfy the requirements of law as to "in-transit" storage was stated in *American Warehousemen's Ass'n v. Illinois Central R. Co.*, 7 I. C. C. 556.

Section 3 is not violated because the in-transit services are uniformly open to the public under the provisions of tariffs concededly complied with. This precludes a claim of preference and prejudice under section 3 with respect to such services.

In the very nature of things, there can be no concession in connection with an in-transit service covered by a tariff, so long as the stated tariff charge is collected. If the tariff charge for a particular in-transit service is actually collected there is manifestly no concession given as to that service. If as to that service there is no concession, it must follow that that service cannot cause a concession as to road-haul rates which are likewise uniformly applied in compliance with the tariffs.

POINT 4.

Since the order is void as to appellants' leases, storage, and in-transit services, it will, unless it is set aside and its enforcement is restrained, deprive appellants of their liberty and property in contravention of the fifth amendment.

There can be no question that the order of the Commission limits appellants in the use of their property and in effect deprives them of their property. Such deprivation can be justified only if, and then only to the extent that, it is a lawful exercise of power under the Interstate Commerce Act,

enacted pursuant to the power of the Federal Government to regulate commerce.—Compare *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 657; *Louisville & Nashville R. Co. v. Motley*, 219 U. S. 467; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146. If the restrictive order of the Commission is an unlawful exercise of the Commission's regulatory power (as we submit, it is) and cannot be sustained as a valid regulation of commerce, then necessarily its effect is to deprive appellants of their liberty and property in contravention of the Fifth Amendment to the Constitution of the United States. *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Rosenbush Grain Co. v. C. R. I. & P. R. Co.*, 130 Fed. 46.

It is established in the decisions of this Court that where an order of the Interstate Commerce Commission is based upon an improper finding the order is void. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, citing *United States v. B. & O. S. W. R. R. Co.*, 226 U. S. 14. In the instant case the below-cost finding, for the reasons which have been shown in connection with its application to appellants' leases, storage services, and in-transit services, does not support the order. Unless, therefore, it is set aside and its enforcement is restrained appellants will be deprived of their liberty and property contrary to the Fifth Amendment.

Conclusion.

Appellants respectfully submit that the Commission's order of February 2, 1937, is unlawful and void, and that the final decree of the United States District Court for the

Southern District of New York sustaining said order should be reversed, and that appellants' prayer for injunctive relief should be granted.

October 19, 1938.

Respectfully submitted,

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APPENDIX.

(See page 10, ante)

The following are the portions involved in this case of sections 2, 3 and 6 of the Interstate Commerce Act and section 1 of the Elkins Act.

SEC. 2. [*As amended February 28, 1920, June 19, 1934, and August 9, 1935. U. S. Code, title 49, sec. 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. [*As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935. U. S. Code, title 49, sec. 3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 6. [*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935. U. S. Code title 49, sec. 6.*] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print

and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(2) Any common carrier subject to the provisions of this part receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this part, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

(5) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Elkins Act, 49 U. S. C., sec. 41(1)

“ * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.”

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DEC 7 1938

CHARLES ELMORE DUNNLEY

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION; *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Statement

Briefs have been filed for appellees in this suit by the United States and the Interstate Commerce Commission jointly; the Warehousemen's Protective Committee; American Warehousemen's Association, Merchandise Division, and jointly by the City of Boston and the Boston Port Authority.

The issue raised in this appeal by appellants' assignments of error is one of law only. It is whether, upon all the findings of fact made by the Interstate Commerce Commission, taken as they stand and at their full face value, an order of the Commission which unequivocally requires the carriers to charge rentals for leased property and rates for

storage services, which are not less than the cost of providing the leased property or performing the storage service, instead of the fair and reasonable value of the lease or service, is a legal order within the power and competence of the Commission to make.

Let us first restate the appellants' contentions in their simplest terms.

1. A concession to a shipper, resulting in a reduction by the amount of such concession in the line-haul rate paid by him for the transportation of his shipment, can arise in connection with the leasing of property to or the storage of freight for such shipper only if the rental for the leased property or the charge for the storage service is less than the fair and reasonable value of the lease or service, so that the shipper receives something of value in excess of what he pays for. That is the very essence of a concession. Without the element of excess value there can, in the very nature of things, be no concession in the transaction.

2. The cost to the carrier of providing the leased property or of performing the storage service, while it may be one of the many factors entitled to weight in determining the fair and reasonable value of the leasehold or storage service, is of itself not the criterion or standard of fair and reasonable value. There can be no concession to the shipper arising solely from the fact that the rental or charge for the leasehold or storage service is below cost. There must be a finding that such rental or charge is also less than the fair and reasonable value. The latter fact, if found, is what gives rise to the concession and consequent violation of the Act which the Commission is authorized by order to correct.

3. If the carriers in this case are making concessions to shippers by charging rentals for leased property or rates for storage that are less than fair and reasonable value, the remedy is to prohibit rentals and storage rates below fair

and reasonable value. Such an order in this case would be proper and its validity could not be questioned by the carriers.

4. But an order prohibiting any lease at a rental below the cost of providing the property, or any storage service at a rate below the cost of performing the service, is wholly unrelated to the assumed evil to be corrected, which arises not out of the below-cost nature of the rental or charge but out of the fact that it may be below fair and reasonable value. Such an order, therefore, since it prohibits a rental or charge that is not in itself unlawful, and does not by such prohibition cure the assumed evil of a concession, is without the power of the Commission, illegal and void.

Now that being, in brief, the appellants' argument, we turn to a consideration of the opposing arguments of the appellees.

Summary of Appellants' Reply Argument.

1. The order unequivocally imposes the cost standard and must stand or fall on the sufficiency of the below-cost findings. All other findings are irrelevant.

2. The Commission has full power, under the fair and reasonable value standard urged by appellants, to correct any practices that may result in concessions or discriminations.

3. A mere loss incurred by a carrier in a lease or storage transaction with a shipper is not enough to establish the giving of a rebate or concession to such shipper, and appellees' contrary claims are untenable. Before a concession can be established it must be further found that the leasehold and the storage provided had, respectively, a fair rental value or a reasonable worth, as ordinarily measured by the prevailing market value and other relevant facts, in excess of what the shipper paid the carrier therefor.

4

4. A finding that the duly filed and admitted collected tariff charges for appellants' in-transit storage are below-cost can not legally establish the granting of a concession, and the lower Court, the Commission and appellees err in their contrary contention.

5. Section 15a of the Act cannot support the order.

6. Appellants have a legal right to make leases at fair rental values and to store goods at the reasonable worth of the storage, and no section of the Act is violated by so doing.

ARGUMENT.

POINT I.

The order unequivocally imposes the cost standard and must stand or fall on the sufficiency of the below-cost findings. All other findings are irrelevant.

The greater part of the briefs of all the appellees is devoted to a meticulous consideration of the factual recitals made in the reports of the Commission, in an endeavor to establish that the Commission found as a fact that the rentals charged by the carriers for leased property and the charges made by them for storage services were not only below the cost of providing the property or performing the services, but were less than the fair and reasonable value of the leaseholds or the storage services.

We reiterate the position taken in our main brief (p. 18), that all this is immaterial because the Commission's order, on its face and by its very terms, forbids appellants to lease property or perform storage services for shippers at rates and charges below the cost of furnishing or providing the same. The order unequivocally and unconditionally prohibits any lease to any shipper and any storage service for any

shipper by a railroad at less than "cost." It commands rigid and unbending adherence to the cost standard at all times and in all circumstances. No matter how many other findings there may be in the Commission's reports, no finding except the below-cost finding can be relied upon in support of the order because the order adopts the "cost" standard, to the exclusion of all else, and thus necessarily excludes all findings made on any other theory.

Moreover, notwithstanding all that is said in appellees' briefs, what the Commission found and what the appellees complain about and assign as the real cause of all the asserted unlawfulness, is basically nothing more than that leases and storage services are offered to shippers at less than cost. That basic claim and finding dominates the three reports. It is the substance of every formal finding made by the Commission as to the leases of each railroad (R., 135, 145, 153, 160, 169); as to the in-transit storage services of each railroad (R., 196, 197, 271) and as to each railroad's commercial or non-transit storage (R., 135, 145, 175). And it was unequivocally accepted by the Court below as presenting the only issue in the case. For that Court said:

"The power to make the order therefore depends upon whether the providing of such services (leases and storage) as were found to have been furnished for less than cost, violates the act in that some shippers are given more favorable treatment than others in like situation."

and further declared that "fair value is immaterial" on the question of concessions (R., 306, 309).

Therefore, it is wholly irrelevant and immaterial that the Commission's reports may contain statements of fact which can be construed as findings that certain leases were made or storage services performed at rentals or charges which were not only below cost but also below fair and reasonable value. Even if it should be held that the Commission's reports contain such findings, they would be legally irrelevant to the question of the validity of the Commission's

order. They could support and save an order which prohibited the carriers from charging rentals or storage less than the fair and reasonable value of the leased property or the storage services. Such an order, if based upon proper findings of fact as to fair and reasonable value, could not be questioned by appellants. But the order with which they are confronted in this case is not an order requiring observance of fair and reasonable value, but solely an order requiring observance of "cost," and must therefore be a valid, unless it can be held that a below-cost rental or storage charge results in a concession to a shipper, regardless of whether or not such rental or charge is below the fair and reasonable value of the property leased or service performed.

That, we submit, is the controlling question in this case, as the lower Court held, and it is solely a question of law as to which any findings that the Commission may have made in regard to fair and reasonable values are wholly irrelevant.

POINT II.

The Commission has full power, under the fair and reasonable value standard urged by appellants, to correct any practices that may result in concessions or discriminations.

Appellees emphasize the alleged wrongfulness of appellants' motives and deeds and the need for correction by an order of the Commission. This extraneous matter can be brought in for no other purpose than to draw attention away from the lack of a sound legal basis for the order and to create an impression that the evils referred to in the Commission's reports can be corrected only by the below-cost order that was entered. The latter thought is expressed in the government brief (pp. 103-5) and is more boldly put in the Warehousemen's Protective Committee brief where it is said (pp. 21-2):

"Two conclusions are inescapable. The Commission cannot compel any corrective action of substance except through incorporation, in its findings and order, of the condition or limitation which is challenged by the appellants. The removal of that limitation by the Courts will license the appellants to continue and augment every phase of their reprehensible practices which were condemned by the Commission."

This appellants categorically deny. The Commission and the courts during the more than fifty years that the Interstate Commerce Act has been in force have been well able to enforce the Act's prohibitions against rebating, concessions and discriminations by applying the same test which appellants here urge: Has the shipper obtained anything of value for less than its reasonable worth?

Appellants recognize that there are conditions referred to in the Commission's reports which justify the entry of an order. They could not complain of an order based on the fair and reasonable value standard. This standard does not, as appellees assume, set up market value as the sole or controlling test. If, for example, the Commission should find, upon adequate evidence, that appellants by wrongful practices had artificially depressed the current market values of leased space and storage services, that fact would properly enter into the determination of the "fair" and "reasonable" value of the rentals and services in question. The powers of the Commission are necessarily broad and appellants are not seeking, by this appeal, to circumscribe or prevent the effective exercise of the Commission's broad powers to stamp out all kinds of concessions and discriminations, by whatever means accomplished.

Appellants must, however, resist the below-cost principle because of the very real injury which it would inflict upon them. All railroads, wholly apart from any warehousing situation, necessarily retain title to many pieces of real property which are not now needed in their carrier operations but which, because of probable future needs or

present unfavorable market conditions, cannot prudently be sold. It is imperative that income be earned through renting such property. Usually a shipper will pay the highest obtainable rental because the ease of access to railroad facilities is an element of value. But if, for example, the property was acquired at the market value prevailing during a period of high prices, and must now be rented during a period of low prices, no one will pay a rental designed to give a return upon costs that are no longer reflected in current property or rental values. The rigid imposition of the cost standard would compel the carrier to leave the property vacant and unproductive of any income. Furthermore, if cost is a valid standard for fixing the minimum rental at which property may be leased to a shipper, it is difficult to advance any reason why it should not also determine the minimum price at which a piece of property may be sold to a shipper. Appellants would suffer heavy losses if they should have to operate under such restrictions.

The adoption of the cost standard in the Commission's reports and order is unqualified and unequivocal. Government counsel, therefore, are not in a position to interpret the order, as they attempt to do on brief (pp. 115-119) as permitting ownership costs to be based on "present-day or current values, no matter what the terms of the lease or the original cost of the building" (Government Brief, p. 115). The order must be interpreted from its face and from the Commission's reports, not from the statements made in the brief of Government counsel. There is no assurance that, if the order were sustained, the Commission would adhere to counsel's interpretation.

POINT 3.

The Commission, the lower Court and all appellees err in concluding that a carrier's loss due to collecting below-cost rentals or storage charges from a shipper is legally sufficient to establish a concession. It must be additionally found that what the carrier collected is less than the fair rental value of the leasehold or the reasonable worth of the storage it provided.

Appellees agree that the fundamental violation of the act found against appellants by the Commission is that they grant concessions or rebates to certain shippers from the tariff rate for transportation in violation of section 6. Concessions or reductions from the tariff rate are the basic illegality with which appellants are charged. The acts out of which the concessions are concluded to arise are the making of leases to and the performance of storage for shippers at rents and charges less than the carriers' cost.

The major contention of appellees throughout their briefs is with respect to what constitutes the concessions. Their position is that if a carrier charges a shipper a rental or storage rate less than sufficient to cover the carrier's cost of providing the property leased or the storage rendered, the carrier's resulting loss automatically and necessarily means that when such shipper ships over the carrier's railroad the tariff rate is, in effect, cut down by the amount of the carrier loss. In other words, their principal argument comes down to the proposition that the mere fact of a carrier loss in a lease or storage transaction is, alone and without more, a concession or rebate to the extent of the loss from the tariff rate in favor of the shipper involved. (Brief, Boston, pp., 7, 8, 26-42; American Warehousemen's Association, pp., 43-

45; Warehousemen's Protective Committee, p., 23.) This of course, the position unequivocally taken by both the Commission in its order (R. 272) and by the Court below. The latter said (R. 308):

"To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the Act makes applicable alike to all shippers under like circumstances and if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the evidence and has been found by the Commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not. That is the vice the order is designed to do away with and it will not be cured if the fair value standard is substituted for the cost standard in respect to commercial services performed to get or hold transportation business. If the cost to the carriers of the inducing commercial services performed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the Act allow as surely whether the commercial services are charged at their fair value or not. In other words, fair value is immaterial except on the question of efficiency in connection with the determination of loss."

In pointing out the error in this fundamental position of appellees, appellants cannot do better than to make use of the same three hypothetical examples set forth on page 37 of the brief for Boston. These examples and counsels' dis-

cussion of them embody the substance of all appellees' argument in this connection. So apt are the examples that we quote them as follows:

Example No. 1.

"If the published rate for transportation between points A and B is \$10 and a carrier pays \$3 out of its treasury to a certain shipper over said route in order to induce the shipper to use the carrier's line, such payment would constitute a violation of Sections 2, 3 and 6 of the Act. This is the simplest illustration of a forbidden rebate."

Example No. 2.

"Similarly, if a carrier pays out of its treasury \$3 for a commercial service which it renders to the shipper without charge, to induce him to use the carrier's line, the rendering of such service clearly would constitute a violation of said sections."

Example No. 3.

"If instead of rendering such service free, a carrier, all other circumstances being the same, receives a return from the shipper of \$1 for the non-transportation service costing \$3, it is submitted that there is equally a violation of sections 2, 3 and 6. The carrier has lost \$2 as a result of its commercial service."

With respect to Example No. 1, appellees' own language is that the cash payment of \$3.00 constituting the rebate is made by the carrier "to a certain shipper". It is this amount of value given to the shipper, for which he gives nothing in return, that constitutes and measures the rebate. The example says nothing about the carrier's loss in cash value from its treasury or otherwise, and that, of course, is immaterial to the rebate. The significant thing is the gain of value received by the shipper from the carrier that can be applied by the shipper as an offset against or concession from the tariff rate.

In Example No. 2, it is likewise what the shipper gains in the form of the reasonable worth of a service rendered by the carrier "to the shipper without charge", that constitutes and measures the concession. The measure of the concession is no greater than the reasonable worth of the service at the time it is rendered "to the shipper without charge", rather than \$3.00, the cost thereof. The point about both the first and second examples is that the concession consists of what is given "to the shipper without charge", whether it is \$3 in cash or \$3 worth of service or some lower valuation of service, and not what the carrier loses.

Coming now to Example No. 3, where the carrier renders to a shipper a non-transportation service costing \$3.00 but collects from the shipper only \$1.00 therefor. Appellees contend that the "carrier has lost \$2 as a result of its commercial service", and that "The carrier thus reduces its line-haul by \$2.00 and receives in effect and through indirection \$8 and not \$10 therefor"; \$10 being the line-haul rate assumed in the example. Appellants emphatically disagree with appellees' entire argument that, upon these facts, the line-haul rate is reduced \$2. A tariff rate cannot be reduced unless there is a benefit to a shipper. To say that there is a \$2 reduction of the tariff rate under the facts of Example No. 3 overlooks the fact that the shipper actually pays \$10, and overlooks also the determining test of concessions, namely, What value does the shipper receive from the carrier in comparison with what he pays to the carrier for the non-transportation service? Examples Nos. 1 and 2 show that the fact and measure of concession depend upon a showing that the shipper actually gets something of value from the carrier without cost to the shipper. That is also the determining test of concession in all the cases analyzed in appellants' initial brief (pp. 19-32), most of which are not referred to at all by appellees and none of which is refuted. Exactly the same determining test must be applied in example No. 3. When it is applied, it becomes clear that there can be no concession to the shipper in that case until it is shown as

a fact that he, too, receives more value in the service furnished by the carrier than he pays for with his \$1.00. This indispensable fact of value received by the shipper in excess of the amount paid is not shown by finding merely that the payment of \$1.00 was less than the carrier's cost; rather, it is and can be shown only by a finding that the shipper's payment of \$1.00 was less than the fair value and reasonable worth of the service the shipper got from the carrier. In other words, in the appellees' third example the shipper pays the tariff rate of \$10 for the road haul service and he also pays \$1 for the non-transportation service. In such circumstances there is neither reason nor logic in saying that any part of the \$10 tariff rate collected is refunded to the shipper until it is found as a fact that the non-transportation service furnished to the shipper has a value exceeding the shipper's \$1 payment for it.)

In taking the position that the mere fact of a carrier loss establishes a concession irrespective of the shipper's gain, appellees' main reliance is placed upon *Lehigh Valley R. R. Co. v. U. S.*, 243 U. S. 444; *Wight v. United States*, 167 U. S. 512; *New York Central R. R. v. United States*, 212 U. S. 481; *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *Merchants Warehouse Co. v. United States*, 283 U. S. 501 and *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361 (Brief, Government, pp. 88-101; Warehousemen's Protective Committee, p. 23; Boston, pp. 8, 33, 35, 42; American Warehousemen's Association, pp. 40-48). Each of these cases is plainly distinguishable from the instant case and can furnish no support for the cost order here in issue.

Concerning the *Lehigh Valley* case, counsel for Boston (Brief, p. 38) say: "There it did not appear that the shippers' contract with the carrier secured a profit to the shipper or that there was not an equivalence between what the shipper received and the carrier gave." Such a statement is an obvious misreading of the decision. What the carrier did there was to agree to pay in cash to a shipper a "varying per-

centage upon the published rates and a salary of \$5000 a year" (p. 445) in consideration of the routing of the shipper's traffic over the railroad and of his efforts to induce others so to do. This Court held that the consideration given by the shipper—acts of shipping and inducing others to do so—was not in law a valuable consideration, and that it is not "allowable to earn money in that way" (p. 446). From this it necessarily followed, as the Court squarely held, that every bit of the cash received by the shipper from the carrier in that case was in law a pure gift to the shipper, and a profit or gain to him without any legal consideration being given by him to the carrier in return. The Court said nothing about loss to the carrier on account of these cash gifts to the shipper. Instead, it squarely held that the entire amount of the cash payments to the shipper, being without any legal consideration at all from the shipper, constituted a refund or concession from the tariff rate in favor of such shipper to the full extent of the amounts paid. In this respect the *Lehigh Valley* case differs distinctly from the instant one. Here it is not even claimed by any one that a refund or concession is established by the mere fact of leasing or storing. The order itself does not purport to prohibit all leasing or storing, but only that which is done at less than railroad cost. By its implicit recognition of the right to lease and store, except at less than cost, it is not open to those who support the rigid cost order to argue that unlawful concessions arise from the mere fact of leasing or storing, as they did in the *Lehigh Valley* case from the mere fact of making any payment whatever to the shipper.

Government counsel cite *Wight v. United States*, 167 U. S. 512 and *New York Central R. R. v. United States*, 212 U. S. 481, as cases of concessions, in which, they argue, the shipper received no benefit or thing of value, whereas the carrier sustained a loss. In the former, the condemned concession was the performance of drayage service from the B. & O.'s freight station to the shipper's warehouse; in the latter, cash rebates were paid. Counsel argue that

these things were of no benefit to the shippers because, in the *Wight* case, the shipper's warehouse was reached by a track of the Pennsylvania Railroad which could have given delivery at the warehouse at the same charge; in the *New York Central* case the shipper could have used competing water transportation at a rate equal to the rail rate less the rebate. This argument closely resembles the argument that was unsuccessfully urged by the defense in the *Wight* case. Counsel disregard the fundamental basis upon which those cases rest: That the shipper, under the Act, shall pay the full tariff rate for the services covered by the tariff and shall receive no additional service or thing of value, unless he shall pay full and adequate consideration therefor. Under the B. & O.'s tariff in the *Wight* case, the shipper was entitled only to delivery at the freight station, but got, for no additional charge, delivery at his warehouse. In the *New York Central* case, the shipper was required to pay the full tariff rate, but got a rebate which cut the rate. In both cases the carrier's expense or loss was purely incidental; the receipt by the shipper without charge of the service or payment not authorized by the tariff constituted the concession. In the instant case, appellants reiterate, a lessee-shipper, for example, gets no benefit or thing of value when he pays (1) the published tariff rate for transportation and (2) the fair rental value of the leased space he occupies.

In *United States v. American Tin Plate Company*, 301 U. S. 402, also relied upon by appellees, there were before this Court orders based upon two findings by the Commission. The first one was that railroad transportation service to and from certain large industrial plants there described ended, and began on what were known as interchange tracks at or adjacent to each plant, and that the carriers' tariff rates for such transportation did not cover the service between the interchange tracks and points within the plant. The second basic finding was that the carriers nevertheless were performing the service of spotting or handling the cars between the interchange tracks and points within the plant without

charge, or were making cash payments to the industry to that service when the industry did it. The Commission ordered the carriers to cease performing or paying the industry for performing the spotting service beyond the interchange tracks, for, upon these basic findings, it concluded as a matter of law that to do either "constituted a refund or remission of a portion of the rate for transportation in violation of Section 6 (7) of the Interstate Commerce Act" (301 U. S. 402, 406). Upon appeal this Court held that the Commission's conclusion was sound and that the two findings mentioned were "sufficient to sustain the orders made" (301 U. S. 402, 409). This was because the findings plainly and definitely showed on their face that whether it performed the service free or paid the industry for doing it, the carrier, in either instance, gave something of great value to the industry for which the industry gave absolutely nothing in return. It was that gift or grant of a thing of value to the industry, in the form of spotting service or cash, that constituted the "refund or remission of a portion of the rate for transportation" in violation of section 6 (7). The carriers' loss incident to performing the service free or paying the industry to perform it had, it is noteworthy, no bearing whatever upon the concession issue, and was not mentioned by the Court.

In the *Merchants Warehouse* case, more fully discussed *infra*, pp. 22-3, the thing condemned was the payment of allowances to "contract" warehouses for the assembling of small shipments into carloads and the distribution of carloads—services which, under the governing tariffs, the carriers could not themselves perform. Thus, as in the *American Tin Plate* case, the allowances were without lawful consideration and were concessions.

Appellees, excepting the Warehousemen's Protective Committee, which does not mention it, also discuss at some length the *New Haven* case, 200 U. S. 361. They rely upon it as the chief support for their position that a loss by a carrier in a lease or storage transaction with a shipper is alone sufficient to establish the grant of a concession from the tariff rate

for transportation, with its consequent discrimination and prejudice. The argument seems to be that, since the loss sustained by the Chesapeake and Ohio from its coal-selling transactions in the *New Haven* case was held to be an unlawful concession with consequent unlawful preferences and prejudices, it follows therefrom that any loss sustained by appellants as a result of their lease and storage transactions in this case is equally unlawful.

The argument is faulty and untenable. That case and the instant one, with respect to the matter of loss, are factually far from parallel. The appellees who rely upon the *New Haven* case overlook, as did both the Court below and the Commission, the crucial fact that in that case it was not the Chesapeake and Ohio's loss, as such, in its capacity as coal dealer that constituted the unlawfulness there found, but rather the fact that the loss sustained arose from the sale of the coal *below its prevailing market value* and resulted in giving the New Haven, the consignee and ultimate payor of the freight charges on the coal, something of value which operated to reduce the freight charges.

It is not open to question that the delivered price of \$2.75 per ton at which the coal was sold in New Haven, Conn., was less than the prevailing market value at that place. Conclusive of that are the facts, stated on page 388 of this Court's opinion, that in 1900 and again in 1902, when the Chesapeake and Ohio failed to make deliveries according to schedule under the 1896 contract, the New Haven Railroad "bought coal in the open market" to make up the shortages. It paid in 1900 \$160,000 and in 1902 approximately \$103,000 more for the then undelivered quotas than the contract price of \$2.75, and made damage claims for these amounts against the Chesapeake and Ohio. And this higher market value continued up to the time the contract in question was made in April, 1903 (pp. 376, 403). The very fact that the New Haven Railroad was willing to enter into the verbal contract in April, 1903, for the purchase thereafter of the 60,000 tons then short under the 1896 contract is in itself sufficient proof

that the stipulated price of \$2.75 was less than the New Haven market price by more than \$103,000. This is because the 1896 contract contained a clause (p. 388) expressly releasing the New Haven Railroad from all liability to take the balance of 60,000 tons which had not been delivered prior to July 1, 1902 under the 1896 contract. Being then under no obligation to take delivery of that shortage of tonnage and having a claim of over \$103,000 for its non-delivery, there could have been no incentive whatever for the New Haven Railroad to agree in April 1903 to take that tonnage at the price of \$2.75 per ton and waive its claim for \$103,000 in the bargain, except the obvious one that to buy the same amount of coal in the New Haven market at that time would have cost it more than \$103,000 in excess of \$2.75 per ton. The New Haven market is therefore established unquestionably as having been far in excess of the sale price of \$2.75.

By means of selling below the then prevailing market value and in that way incurring a loss, the Chesapeake and Ohio was able to and did give to the New Haven Railroad, as consignee-buyer, a concession from the tariff rate and the resulting preferences and advantages therein described that no other shipper or consignee could obtain. These positive advantages and preferences to the New Haven resulted directly from the below-market selling. The New Haven, in its argument (p. 373), practically conceded that it received an advantage; "a discrimination in favor of the New Haven road and against others" was averred in the bill (p. 382) and it was the New Haven that appealed (p. 386).

This Court, after fully reciting the facts showing that the coal was sold below origin and destination market value, stated that the question for decision in that case was: "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?" The terms, "price stipulated in the contract", and "cost of purchase", and "cost of deliv-

ery" appearing in the statement of the question must, of course, be given such significance as they had in the light of the facts then before the Court. In those facts, "price stipulated in the contract" referred to the price of \$2.75 per ton to be paid by the New Haven Railroad, a price substantially less than the New Haven market value, and the term "cost of purchase" had reference to the contemporaneous agreement of the Chesapeake and Ohio with the mining companies to pay the market value of the coal at mines (pp. 387, 389), together with the "cost of delivery" by boat beyond Hampton Roads to New Haven. Thus, the question at issue in the *New Haven* case, and the one really decided was: "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the selling price stipulated in the contract does not cover the prevailing market value of the goods sold over and above the published freight rates?"

There is a sound and rational basis for the Court's negative answer to that question, despite the fact that such questions are now almost entirely moot by reason of the subsequent enactment of the commodities clause (49 U. S. C., Section 1(8)) prohibiting ownership by a carrier of the goods it transports. The Chesapeake and Ohio, by purchasing goods and contemporaneously selling them at less than the amount of their market value over and above its tariff rates for transporting them, gave to the New Haven Railroad as consignee-buyer the very preferences and discriminatory advantages which, as the Court declared, it was the great purpose of the act to prevent (pp. 391, 392). The Court further declared that the "purpose" of the all-embracing prohibition against either directly or indirectly charging less than the published rates, "was to compel the carrier as a public agent to give equal treatment to all" (p. 392). "Equal treatment to all" is possible only if and so long as the standard of fair market value is observed as the price of what the carrier does outside the field of transportation, rather than the standard of carriers' cost, unless such cost and fair market value are

substantially identical, as they were in the *New Haven* case, and as may generally be assumed to be true in cases of contemporaneous purchase and sale of chattels.

Thus, the *New Haven* case is but another case striking down an arrangement that resulted in a benefit to a favored shipper. In that case, where the element of contemporaneous purchase and sale of chattels was present, the Chesapeake and Ohio's loss constituted and measured the New Haven's gain. Because the former sold the coal for less than the sum of mine price and transportation charges, the latter got the coal for less than that sum—a gain to the New Haven to the extent that the price paid to the Chesapeake and Ohio was less than what the New Haven would have paid, had it bought the coal at the same price at the mine and paid the tariff transportation charges. But in the instant case, the carrier's loss in renting real property or performing a storage service does not result in a gain to the shipper because the transaction which caused the carrier's loss—the purchase of real estate at a price level higher than that now prevailing—is not contemporaneous with the leasing or storage transaction. Because of the intervening time and the fall in real estate and rental values which may go with it, a carrier may incur a loss in renting property or rendering storage service for which it has nevertheless collected from the shipper the fair and reasonable present value. If the appellees are right in construing the *New Haven* case as holding that a carrier grants concessions when it does not obtain cost, it must follow that a carrier desiring to sell or lease to a shipper a piece of real estate bought twenty years ago must, to avoid a charge of rebating, sell for original cost or obtain a rental return based on original cost, even though the fair and reasonable market or rental value is much lower. This, the necessary result of the rigid cost order, is not the result of the *New Haven* case, which was merely to strike down an unlawful benefit to a favored shipper. The complete absence of the contemporaneous element in the lease and storage

transactions in the instant case robs the present situation of the vital element of contemporaneousness which, in the *New Haven* case, was necessary to make the carrier's loss a true measure of the shipper's gain.

POINT 4.

A finding that the duly filed and admittedly collected tariff charges for appellants' in-transit storage are below cost can not legally establish the granting of a concession; and the lower Court, the Commission and appellees err in their contrary contentions.

With respect to in-transit storage services covered by tariffs, appellants' attack upon the cost order is twofold. First, we contend that the Commission's basic finding that the charges for these services are below cost is legally insufficient to establish a concession, for exactly the same reasons as are set forth at length with respect to the inadequacy of the below-cost finding as to lease rentals (Appellants' Brief, pp. 18-33). Our second attack relates exclusively to the legal significance of the fact that the in-transit charges are all covered by duly filed and admittedly observed tariffs (R. 192, 271). Appellees ignore the point that under the Commission's third report, which expressly reversed the two prior reports in this respect, appellants are affirmatively required to continue to file and keep on file these tariffs (R. 271).

The substance of appellees' argument is that tariffs are but forms of words, and that the publication in tariffs of the rates, rules and regulations for appellants' in-transit storage service is utterly without any legal significance. It is therefore urged, just as the Commission held (R. 271), that the in-transit storage is to be treated as commercial storage the same as if not covered by tariff, and that the finding that the

storage charges named in the tariff are below cost is enough to support the legal conclusion that a concession is thereby granted to all shippers who pay below-cost tariff storage rates. (Brief, Boston, p. 15; American Warehousemen's Association, pp. 48-60; Warehousemen's Protective Committee, p. 25). They cite as authority for the argument *United States v. American Tin Plate Company*, 301 U. S. 402, and *Merchants Warehouse Co. v. United States*, 283 U. S. 501.

There is irreconcilable conflict, as pointed out in appellants' original brief (p. 38) between the requirement of the third report and that the in-transit services must be covered by filed tariffs and the position of the Commission (Government brief, pp. 106-112) and other appellees that concessions arise on account of the rendition of these same services at the stated tariff charges (R. 271). Appellees rely upon *Merchants Warehouse Co. v. United States*, 283 U. S. 501, and *United States v. American Tin Plate Co.*, 301 U. S. 402, as authority for the proposition that the tariffs in the instant case are of no legal consequence. But these cases do not so hold. In the *Merchants Warehouse* case, the Commission found that certain allowances for loading and unloading of freight at contract warehouses, designated by the carriers as stations, were to gain traffic and compensate the warehouses for solicitation of freight (p. 501); that these warehouses were not in fact public stations (p. 505); that the services of loading and unloading and storage, which the warehouses rendered and which were claimed to be the consideration for the allowances, were not "transportation" for which allowances could be made (pp. 506, 509). The last holding rested mainly on the ground that the principal service rendered by the warehouses was not loading, unloading or storage but was the assembling of smaller shipments into carload lots and the breaking up of carloads into smaller shipments—services which the carriers, under Rules 14 and 23 of the Classification, were not permitted to perform. This Court said:

*** The amount of the allowances paid during the four years preceding the hearing aggregated more than \$909,000; and the conclusion is inescapable that a very large part of the total is *for the service of breaking up and distributing carloads in less than carload lots, which the carriers could not lawfully perform at their own public freight stations.* Examination of the evidence can leave no doubt that it is the performance of this service, free of charge, to shippers, featured in appellants' advertising and solicitation of patronage, which induces the consignment of freight by shippers to them over the lines of the carriers and withdraws the business from competing warehouses. Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by Sections 2 and 3 of the Interstate Commerce Act.—283 U. S. 501, 510-11. (Italics supplied.)

Thus, in the *Merchants Warehouse* case, the service of breaking up and distributing carloads, which the Commission found was paid for by the condemned allowances, was not covered by tariff publication at all; in fact, the governing tariffs forbade its performance. Here, on the contrary, the in-transit services and the charges therefor are completely covered by tariff.

In *United States v. American Tin Plate Co.*, 301 U. S. 402, the Commission had found that the linehaul rates published by the carriers did not include the service of spotting cars beyond the interchange tracks of certain large industries and that the payment of allowances for service beyond such interchange tracks was a departure from published tariffs in violation of Section 6. But the *American Tin Plate* case does not forbid the carriers from performing spotting services beyond industrial interchange tracks at proper tariff charges. This is conclusively shown in the Commission's report there challenged. *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 33; see also the Commission's headnotes at page 11 of that decision.

Before the instant case could be analogous to the *Merchants Warehouse* and *American Tin Plate* cases, it would have to be shown that the carriers perform in-transit storage and other services *without any charge* in addition to the line haul rates. However, that is not the situation; the tariffs provide for, and appellants collect, additional charges for the in-transit services. If there is any illegality in those charges, it must rest upon grounds different from those present in the two cases cited. But the order and supporting findings in the instant case are based wholly upon the inapplicable *Merchants Warehouse* and *American Tin Plate* cases doctrine.

Since the in-transit services have been and must continue to be covered by tariffs which, it is conceded, have been fully complied with, the legal question is, How can a carrier's admitted compliance with the terms of a required in-transit tariff give rise to a concession from its roadhaul tariff? The concepts are mutually contradictory. In the very nature of things, there can be no concession in connection with an in-transit service covered by a required tariff, so long as the stated tariff charge is collected. If the tariff charge for the particular in-transit service is actually collected, manifestly there can be concession given as to *that service*. If as to *that service* there is no concession, it must follow that *that service* cannot cause a concession from the road-haul rates which are likewise uniformly applied in compliance with the tariffs. Appellees have disclosed no legal error in this position.

Appellants pointed out in their original brief (pp. 38-9) that, under the decision of this Court in *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, the in-transit services are "transportation." This view, which appellants here reaffirm, is challenged in the Government brief (pp. 106-8). Even if counsel were right in this challenge, they could not upset appellants' argument because, as pointed out on pages 41-2 of our original brief, it is not essential that there be a technical determination that the in-transit services

are "transportation." That which the appellees concede—that these services are proper subjects of tariff publication and are covered by duly filed and admittedly observed tariffs—is all that is necessary, as a matter of law, to make impossible the existence of concessions.

It is further argued by appellees that the in-transit storage services, although published in tariffs, are not open to all persons and thus cause unlawful discrimination and prejudice (Brief, Government, p. 111; Warehousemen's Protective Committee, p. 27; Boston, pp. 7, 21). No reference, however, is made to any finding by the Commission that any particular shipper on any particular occasion was ever denied by any carrier full opportunity to avail himself of the tariff privileges if he so desired. The findings referred to (R. 192, 197) go merely to the below-cost character of the storage and other charges. Apparently what is really meant by saying that the services are not open to all under the tariffs is no more than that certain shippers "have no need for" in-transit services (Brief, Boston, pp. 21, 33). There is obviously little merit in a contention of unavailability on the part of one who either has no need for or ability to use a tariff service. It has been settled since the Commission's early decision in *American Warehousemen's Association v. Illinois Central R. R. Co.*, 7 I. C. C. 556, that "impartiality and publication" satisfy the requirements of the law. Any contention based on unavailability is foreclosed here because the below-cost order is bottomed wholly upon the concession theory, which is embodied also in the supporting concession findings. Neither order nor findings are based upon discriminatory operation, apart from alleged below-cost concessions, of the condemned tariff provisions.

POINT 5.

Section 15a of the Act cannot support the order.

In an effort to escape the demonstrated invalidity of the order as an exercise of power under Sections 2, 3 and 6 of the Act, final resort is had to Section 15a to support it as necessary to secure efficiency and economy in appellant's operations (Briefs, Government, pp. 102-106; Warehousemen's Protective Committee, p. 30. Neither of the other appellants makes any contention on that ground). The complete answer to this argument is that the situation in which Section 15a may be invoked is not presented here and, even if it were, there are no findings in the instant case upon which Section 15a might be made to operate.

First, as to the lack of a proper premise, the language of the section makes it plain that it is only "in the exercise of its power to prescribe just and reasonable rates" that the Commission may invoke that section. Manifestly, the Commission has not undertaken in the instant case "to prescribe just and reasonable rates" and no appellee makes any such suggestion. This entire absence of the whole premise upon which power under Section 15a may be exercised, therefore, precludes any valid claim that the assailed order is a proper exercise of such power.

Second, the Commission did not find that to prohibit appellants to lease or store at less than cost would give them more revenue. "The raising of rates," as this Court has said, "does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it by discouraging patronage."—*Florida v. United States*, 282 U. S. 194, 214.

What is necessary in the way of findings to support the present order under Section 15a was well set forth by the statutory District Court for the Southern District of New York in *Baltimore and Ohio RR. Co. v. United States*, 22

F. Supp. 533. That was a case in which the Commission had ordered certain transportation rates reduced on the ground that, although they were not unreasonable, the reduction might bring the carriers more traffic and revenue and thus greater efficiency and economy. However, the governing principles there applied by the Court to determine what findings were there necessary are equally applicable to the instant order if it is attempted to justify it as one made for the same purpose of efficiency and economy. The Court held with respect to the power of the Commission to change rates for purposes of efficiency and economy that (p. 536):

"if that power exists its exercise depends upon a good many other variables than those relevant merely to fixing the usual reasonable rate.

"The Commission must go on to consider how much new traffic the reduction will move, what will be the profit on it, and how it will affect the other traffic upon the carrier's lines.

"We do not suggest the answer to these questions, except to say that if the power exists, such answers there must be, at least to what touches the carrier directly affected.

"This serves to indicate the complexity of the problem, once it be conceded that rates may be fixed with an eye, not alone to their reasonableness considered by itself—a sufficiently manifold quest in itself—but to the possibility that though reduced below what would otherwise be reasonable, they will still bring additional revenue which will strengthen the carrier concerned, or that carrier and others as well."

Findings that will answer these same questions are as indispensable here as in the case cited.

POINT 6.

Appellants have a legal right to make leases at fair rental values and to store goods at the reasonable worth of the storage, and no section of the Act is violated by so doing.

In appellants' initial brief (pp. 29-33) the decisions of this Court and of other courts, as well as of the Commission supporting this proposition are cited and briefly discussed. Appellees have not contradicted or explained away the force or effect of these authorities. By supporting the order they, of course, concede the carriers' right to lease and store, for the order itself does not purport to prohibit all the leasing and storage, but only such as is done at less than cost.

Two of the briefs of appellees reveal that appellants' contention for the right to make leases at fair rental values rather than to be bound by cost, is precisely the standard which the private warehouse industry itself approves and follows. In the brief for American Warehousemen's Association (note, p. 45) it is stated as the industry's position and practice that rents "*should be based on such present values as to give a fair rental amount as of today, no matter what be the original cost of the building.*" (Italics in original). Government counsel likewise adopt fair rental value rather than cost as the proper standard. In their brief (p. 115) it is stated that "the item of rent, or in lieu thereof, the costs incident to ownership, are to be based on present-day or current values, no matter what the terms of the lease or the original cost of the building."

The Commission also, in a decision announced by it as recently as October 11, 1938, in *Freight Forwarding Investigation*, 229 I. C. C. 201, has not followed the cost standard of rentals imposed by the order in this case and, instead, has reaffirmed the fair-value-standard previously adopted and followed by it in *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, and *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 691. The whole problem of

carriers' right to make leases to shippers and rental standards to be observed in so doing was involved in the *Freight Forwarding* case and, after full review by the Commission, the rule announced with respect to rentals (p. 215) was that "Respondents should lease facilities to forwarders [shippers] at terms certainly no less favorable to the lessors than are embodied in leases by others of somewhat similar facilities in the same community."

The Commission further says (p. 216) to the extent that the rentals are inadequate "the forwarders receive concession from the tariff rates", and Commissioner Eastman in his separate opinion further affirms that as to leasing (p. 319) "The real question seems to be whether the rentals are less than the going rental value of property available and suitable for the purpose, and the record does not enable a definite finding on this point."

The failure of the Commission by its order in the *Freight Forwarding* case to prescribe cost as the rental standard is conspicuously significant. The legal question as to the rental standard a carrier may observe without violating the act is in the instant case no different from what it was in the *Freight Forwarding* case, and no different standard should be imposed. The warehouse industry's admitted adherence to the standard of fair rental values rather than cost, and the Commission's own sanction of that standard since promulgation of its order in this case, are but persuasive confirmation of the legal soundness of appellants' contention for the right to observe that standard rather than be held to the impractical and unlawful cost standard.

CONCLUSION.

We have then, in last analysis, the simple situation of an order that unqualifiedly prohibits any leasing and storing at less than cost. It rests alone upon the finding that appellants now do such leasing and storing, and upon the Commission's legal conclusion that concessions are thereby given in violation of section 6. Being concededly (R., 104) without power to make the order save as a cure for some

infraction of the act, it follows necessarily that if the Commission was wrong in its legal conclusion that a below-cost rental or storage charge to a shipper is alone adequate proof of an infraction by way of a concession to such shipper, the whole foundation for the order disappears. The fundamental legal error of that conclusion has been shown herein (pp. 9-21 *supra*) and in appellants' initial brief (pp. 18-33). It is there set forth to show the error of concluding that the below-cost finding is adequate to prove concessions so firm and unshaken by any argument appellees have made. This leaves the order itself without any legal foundation and void.

Appellants pray that the order and decree of the special master constituted District Court of the United States for the Southern District of New York, sustaining the Commission's order of February 2, 1937, (R. 272) be reversed, and that the cause be remanded with directions to the lower Court to grant appellants' prayer for injunctive relief.

Dated: December 6, 1938.

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SUPREME COURT OF THE UNITED STATES.

No. 133.—OCTOBER TERM, 1938.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR APPELLEE, THE WAREHOUSEMEN'S
PROTECTIVE COMMITTEE.**

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BRIEF FOR APPELLEE, THE WAREHOUSEMEN'S PROTECTIVE COMMITTEE.

OPINIONS OF THE COURT BELOW AND COMMISSION.

The opinion of the Court below, the specially constituted statutory Court (R. 302), is reported at 20 F. Supp. 273, and the concurring opinion of Judge Hulbert (R. 311) at 20 F. Supp. 917.

Three reports of the Interstate Commerce Commission were issued. The case is entitled Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y. It is an investigation instituted by the Commission on its own motion into practices of carriers by railroad which affect their operating revenues and expenses (R. 25).

The three reports of the Commission are identified as follows:

Propriety of Operating Practices—New York Warehousing, 198 I. C. C. 134, decided on December 12, 1933 (R. 29-115).

Propriety of Operating Practices—New York Warehousing, 216 I. C. C. 291, decided on June 8, 1936 (R. 120-199). This was a report upon further hearing. The case was reopened for this further hearing by the Commission's order of May 6, 1935 (R. 116).

Propriety of Operating Practices—New York Warehousing, 220 I. C. C. 102, decided on February 2, 1937 (R. 268-271). This was a report upon reopening of the case for further argument in response to petitions of the carriers (R. 201-266).

In its report of December 12, 1933, the Commission did not issue an order but did admonish the carriers to discontinue their unlawful conduct and referred to prospective action that it might take under the Elkins Act. 198 I. C. C. 202 (R. 113).

In its second report of June 8, 1936, the Commission referred to actions which it had instituted under the Elkins Act (216 I. C. C. 292 (R. 122)), and it issued its cease and desist order of June 8, 1936 (R. 199, 201).

With its third report of February 2, 1937, the Commission issued its order of that date, amending its prior order (R. 272-274). This is the order which is challenged by the appellants in this case.

PRINCIPAL QUESTION PRESENTED

Are the Commission's findings, and its order, as a matter of law, invalid because, instead of permitting the appellants to maintain rates and rents reflective of fair value

and reasonable worth, the Commission restrained the appellants from affording storage and renting property to shippers at rates and rents that fail to compensate the appellants for the costs incurred by the appellants.

STATUTES INVOLVED.

Pertinent statutory provisions are set forth in Appendix A:

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the Southern District of New York, a statutory court of three judges, dismissing appellants' bill for injunction to set aside and restrain enforcement of the above-mentioned order of the Interstate Commerce Commission. Reference to the three reports of the Commission underlying this order is given above.

The appellants are the trunk line railroad systems that serve the Port of New York District.

This brief is submitted by the Warehousemen's Protective Committee, an appellee. We submit that the Commission's order should be sustained and appellants' petition should be dismissed.

We are speaking for our membership which includes 57 warehouse companies engaged in the warehouse business, both refrigerated and non-refrigerated storage, in the Port of New York District. The names of these companies are set forth in Appendix B hereto. The unlawful conduct of the appellants effected violations of the statutes as found by the Commission and subjected these warehouse companies, herein referred to as complaining warehouse

companies, to unjust discrimination and undue prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act.

The Commission's order is intended to give force to underlying findings that the appellants violated Sections 2, 3(1) and 6(7) of the Interstate Commerce Act. Also the efficiency and economy provisions of Section 15a(2) of that Act.

Appellants' dilemma did not arise from railroad transportation service. In the Port of New York District, the appellants, departing from common carrier functions, elected to engage in the warehousing and commercial storage of property—activities of private business which are beyond the scope of transportation. All of the rates and rents under consideration are rates and rents for non-transportation services or uses. In short, the Appellants assumed shippers' services at subnormal rates and rents thereby granting unlawful rebates and concessions and thus influencing the routing of the stored freight over appellants' railroad lines.

What is the foundation for the proceeding designated Ex Parte 104? The carriers, alleging insufficiency of revenues, repeatedly appealed to the Commission to authorize general increases of their freight rates. In one of these cases, *Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 586*, the Commission after approving such increases announced that it would, in a supplementary proceeding, give consideration to instances of dissipation of railroad revenues and hence the proceeding in Ex Parte 104 from which the order in question arose.

Appellants, in their brief, seek to narrow the findings of the Court below and the Commission to bare findings confined to the "costs of service" component of rents and rates. The Commission did not make such attenuated find-

ings. The evidence disclosed wilfully designed violations of the Interstate Commerce Act and Elkins Act. The findings of the Commission dealt with all phases of these violations and with the "below cost" rents and rates as being one of the several components. That appears from the following review of the findings.

Variety of services. We quote from the Commission's reports to show the various kinds of warehousing and storage which the appellants (referred to as respondents in the Commission's reports) elected to engage in in the New York District.

"At New York respondents now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies. The forms of title to the warehouses are various. In a number of instances the respondents lease all or parts of buildings for warehousing operations; in others they own the ground, aided in financing the structures located thereon, and lease from their own subsidiaries space in such buildings; and in still others they own the land and structures, but lease them in entirety or in large part to subsidiary corporations for warehouse operations. In the variety of such arrangements the result is always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purposes railroad management may have in mind. These matters will be dealt with more fully when we consider the practices of individual respondents." 198 I. C. C. 138-139 (R. 35).

Ultra transportation activities. The following excerpts, quoted from the Commission's reports, show clearly that the warehousing and storage services under consideration are non-transportation activities beyond the scope of common carriage.

"The term 'transportation' as used in section 1(3) of the act includes the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. Under section 1(4) it is made the duty of every common carrier subject to the act engaged in the transportation of property to provide and furnish such transportation upon reasonable request therefor. While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal. *State v. Southern Pacific Company*, 52 La. Ann. 1882; 28 So., 372; *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169. It is clear that much of the storage service described of record is not such as the carriers are required by the act to furnish." 198 I. C. C. 194-195 (R. 103).

"As stated above, much of the warehousing or storage service under consideration here and the handling necessary in connection therewith is not storage incidental to transportation but is commercial storage. Compare *Merchants Warehouse Co. v. United States*, 44 Fed. (2d) 379, affirmed 283 U. S. 501." 198 I. C. C. 196 (R. 104).

"We shall deal first with warehousing operations of the respondents, carried on through railroad departments, subsidiary companies, or affiliated companies which are in all respects voluntary warehousing activities, such as 'are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangement and dealing with patrons of warehouses.' Prior report, page 139.

"In most cases respondents utilize certain space in their owned or affiliated warehouses, in which storage and services incidental thereto, is provided by them or their subsidiary companies. Other space is rented to shippers for the storing, manufacturing, blending, pro-

cessing, packaging, or distribution of their goods. Storage in some of these warehouses, as provided for in so-called storage-in-transit tariffs, is also conducted by the respondents, but such storage is mentioned only incidentally in this section of the report, and the practices relating thereto are later fully discussed.' 216 I. C. C. 294 (R. 124).

There are additional findings to the same effect in the Commission's second report. 216 I. C. C. 348, 349 (R. 188-189). As well stated in that report the business of a railroad is transportation, not storage.

Commercial warehouse companies, non-carrier companies, have performed the commercial warehousing and storage throughout the country for more than 100 years. 198 I. C. C. 137 (R. 34). Departing from this well-established custom and practice the appellants, in the Port of New York District, led by the Erie Railroad Company embarked on a large scale in this field of private business beginning in the years 1927-1929. See 198 I. C. C. 181 (R. 87) and 216 I. C. C. 295, 296 (R. 125).

Gist or gravamen. Certain shippers need and utilize both interstate transportation and commercial storage of their freight. The storage is a component of their selling activities. Thus the aggregate of the charges for the two services is of transcendent importance to the shippers and an undue reduction of the storage charge component is as efficacious as an undue reduction of the transportation charge component. The Commission's reports reveal very clearly that the appellants assumed the commercial warehouse services of selected shippers at sub-normal below cost rates and rents with purpose to reduce the aggregate charges of these shippers for the two services and thereby give them unlawful rebates and concessions. On this point we direct attention to findings made by the Commission as follows:

"The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charges for the two services. It is urged that if a railroad affords such warehousing and storage at unduly low rates as an inducement to the routing of traffic via its line, it subjects the independent warehouse companies to unfair competition." 198 I. C. C. 139 (R. 36).

"It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which complainants cannot meet." 198 I. C. C. 189 (R. 97).

"Although the carriers charge all shippers alike the tariff rates for rail transportation, it is obvious that the according of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited by section 2 of the act. It is likewise clear that the shippers receiving the benefit of such noncompensatory charges are given undue preference or advantage in violation of section 3(1) of the act over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefits." 198 I. C. C. 198 (R. 108-109).

Wrongful motive. The Commission's reports contain findings of the wrongful intent and corrupt purpose attending appellants' invasion of the commercial warehouse business. The Commission said:

"The motive of the carriers in engaging in the commercial business is to induce shippers to use their rail

facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. Those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit. The rail carriers directly or through dominated and controlled subsidiaries seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen. It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation.

The conflict of interests is not confined to rail carriers and private warehousemen, but concerns also the rail carriers as between themselves. The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business. The conflict of interest applies also as between larger shippers, controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses. It should be borne in mind that certain carrier-controlled warehousing facilities are not available to the general public, but only to selected concerns controlling large volumes of traffic. The tariffs provide that arrangements for storage space for westbound shipments in or on railroad piers or warehouses must be made in advance with respondents, or with outside warehouses if stored therein." 198 I. C. C. 196-197 (R. 105-106).

Dissipation of Railroad Funds and Revenues. Appellants have not undertaken to point out any beneficial re-

sults to the public, themselves or any one emanating from their invasion of the commercial warehouse business. The Commission's reports, written in the light of the efficiency and economy provisions of Section 15a(2) of the Interstate Commerce Act, from which we now quote, show indefensible dissipation of railroad funds and revenues arising from appellants' invasion.

"The matters and transactions referred to in this report are further illustrations of serious waste resulting from the competition of railroads with each other for traffic. The extent thereof is indicated by the statements contained in appendixes I to III. By referring to appendix I it will be noted that seven of the carriers have expended over \$36,000,000 in connection with the warehouse projects considered herein, and appendix II shows the loss incurred thereon during 1931 was over \$1,260,441. Appendix III shows the loss per ton of freight stored in-transit ranges from \$1.28 to \$6.18. These losses are added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. The private warehouse interests estimate the total annual losses to be \$3,152,119.63." 198 I. C. C. 202 (R. 112).

The Commission also pointed out that a large part of appellants' expenditures on new warehouse facilities were made when the capacity of the existing facilities were largely in excess of need and demand. 216 I. C. C. 295, 296 (R. 125). In other words, railroad funds and revenues were improvidently wasted in producing over-capacity.

The Erie Railroad Company started the improvident venture. 198 I. C. C. 181 (R. 87). The other appellants followed that lead and, although some of them gained a traffic advantage temporarily, in the end when each had matched the other's rebating or concession device the circle was completed and each had the same share of competitive

traffic that it had at the inception of the first device—but all at the lower level of rates to which their warehousing ventures had reduced their published tariff rates. 198 I. C. C. 190-191, 202 (R. 98, 113). New traffic was not created and no beneficial end was realized by the carriers, the public or any person. The Commission said:

“Whether or not initial advantages may have been realized at one time or another by individual carriers, the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.” 198 I. C. C. 202 (R. 113).

Unjust discrimination and undue prejudice. The subnormal rates and rents of the appellants supplemented by their competition and practices subjected the complaining warehouse companies and others to unjust discrimination and undue prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act. In this respect we direct attention to the following findings of the Commission:

“Complainants offered testimony and exhibits, neither of which was refuted by respondents, which show that they have lost business in practically every form of warehousing to the respondents’ affiliated warehouse and storage companies. They claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider trade activities and not common-carrier service.

The warehousemen claim that participation of the railroads in warehousing is destructive in the same degree to its competitors therein as it would be destructive to manufacturers of any commodity which the railroads might attempt to manufacture, for the reason that the railroads are not dependent on profit arising from their warehouse activities. Complainants also point to the large financial losses of respondents in

their warehouse activities, and to the fact they can use their freight revenues to offset their losses, which the competing warehouses cannot do.

Warehousing and storage are highly specialized businesses, as many commodities must be segregated and many require special equipment in handling. A commercial warehouseman can choose the commodities he wishes to store, as it would not be practicable for any company to build many special commodity warehouses to store any and all commodities offered. The tenor of complainants' testimony was to the effect that the competition of the railroads would ultimately drive independent warehousemen out of business, with the result that railroads would then be called upon to deal in all of the various forms of specialized storage." 198 I. C. C. 190 (R. 97-98).

"Although the carriers charge all shippers alike the tariff rates for rail transportation, it is obvious that the according of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited by section 2 of the act. It is likewise clear that the shippers receiving the benefit of such noncompensatory charges are given undue preference or advantage in violation of section 3(1) of the act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefits." 198 I. C. C. 199 (R. 108-109).

"The private warehouse companies are 'persons' within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the charges which they are required to pay and the treatment they are accorded by carriers subject to the act are subject to the provisions of these sections, as well as the provisions of the Elkins Act. Compare *Merchants Warehouse Co. v. United States*, *supra*. As shippers, they

are to be dealt with in accordance with the provisions of the act." 198 I. C. C. 200 (R. 109).

Costs of Service. The relevancy and great importance of costs of service in the making of rates is axiomatic. The Court below, confirming the conclusions of the Commission, made 44 findings in respect to costs of service relevant to the fixation of rates and rents (R. 358-363, 365-366, 368, 371-373, 375-376, 380, 382-384, 386-388, 390-397, 400-401). This is indicative of the mass of evidence which aided the Commission in making its findings.

SUMMARY OF OUR ARGUMENT.

1. The Commission did not make bare findings that leases of property and the affording of storage by appellants to shippers at rates and rents below appellants' costs of service were unlawful in violation of Sections 2, 3(1) and 6(7) of the Interstate Commerce Act solely because the rates and rents were lower than appellants' costs of service. The findings were much broader in that they disclosed all of the various steps of wilfully designed rebates and concessions and treated the collection of below-cost rents and rates as one of the final steps that consummated the wilful violations of the statute. Accordingly the Commission's order condemns rates for service which fail to compensate the appellants for their costs of performing the service.

2. The Commission's findings reflect appropriate and sufficient consideration of all elements entitled to consideration in the fixation of rates and rents including reasonable worth and fair value. These findings, largely findings of fact, are sound in law and have substantial support of evidence and therefore should not be disturbed by the Court.

Chicago, R. I. & P. Ry. Co. v. United States, 274 U. S. 29,

33-34; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663.

3. The appellants have attempted to argue the merits of rates and rents reflecting "fair value" and "reasonable worth" as a question of law divorced from facts and the evidence of record. That mixed question of fact and law cannot be argued in the absence of error assigned to the evidence of record and findings of fact. *Mississippi Valley Barge L. Co. v. United States*, 292 U. S. 282, 286; *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 148.

ARGUMENT.

1. **The Findings, Made by the Court Below and the Commission, that the Appellants' Warehousing Rates and Rents must Conform with Appellants' Costs of Service, is Not Error.**

In their Point 1 the appellants urge several contentions. They contend that (1) the Commission's findings are confined to imposition of a cost standard in the fixation of warehousing rates and rents, (2) such confinement is error of law in that the Commission should have prescribed "fair value" or "reasonable worth" as the lawful standard for rates and rents in lieu of the cost standard, and, (3) the sole foundation for the violations of Sections 2 and 3(1) of the Act as found by the Commission is the erroneous finding of violations of 6(7) of the Act which are predicated on the invalid prescription of cost of service as a legal standard for warehousing rates and rents. According to appellants' argument all of the many findings made by the Court below and the Commission, and the Commission's order in its entirety, must fall, without any consideration

being given to the evidence of record, under the force of these contentions which are argued as points of law.

As to this first contention, the Commission did not make such bare findings. A brief review of the Commission's reports will readily disclose an exceptionally full and complete recital of details from the inception of each instance of appellants' misconduct. Instead of such bare findings confined to service costs the findings show (a) inception; (b) plan and purpose, (c) wrongful motive, (d) intermediate steps and (f) consummation of the wilfully designed plans to give unlawful rebates and concessions by according the shippers the benefit of subnormal below cost rates and rents at the expense of the appellants.

The Commission's findings and order restrain the appellants from leasing property or affording storage to shippers at rents or rates that fail to compensate the appellants for the costs thereof. But these sub-divisions of the comprehensive findings, which are clearly intended to extract the monetary advantage from the rebates and concessions, should not be deemed to be the whole substance of the findings or to set up a bare cost of service standard for other cases in which the below cost rates or rents are not a component of unlawful rebate or concession devices.

Wrongful purpose—specific intent to give unlawful concessions is stressed in the findings. In such instances appellants' inferences as to extraneous conditions which might justify other below cost rates or rents are irrelevant and immaterial.

Turning to the "fair value" and "reasonable worth" contentions. On their face these terms arise from a factual foundation and appellants have not cited authorities attributing a purely law meaning to these terms. These terms do not provide a foundation for an argument of a

question of law divorced from complex facts. The substance of appellants' argument is a question of fact which appellants are attempting to argue as a question of law divorced from the evidence of record and findings of fact on this very subject.

The Commission dealt with this question as a question of fact. The Commission's reports show that it made a lengthy and exceptionally exhaustive investigation. The proper assumption is that the Commission gave sufficient consideration to every element of rate and rent making that deserved consideration, including reasonable worth and fair value and that assumption is well supported by the references which follow.

The complaining warehouse companies, at an early stage of the investigation, put all elements of rate and rent making in issue. This appears from the following statement quoted from the first report of the Commission in this case:

"The warehouse interests generally are in accord in contending that respondents' storage rates are unduly low, and that thereby certain violations of law are brought about." 198 L. C. C. 139 (R. 36).

The following quotations from the Commission's reports not only show that the Commission gave appropriate consideration to "reasonable worth" and "fair value" but they also serve to bring out clearly that the contention of the appellants' predicated on these terms is a complex question of fact which, if argued, cannot be argued as a question of law but should be argued in the light of such exceptions to the evidence and findings of fact as the appellants are able to urge:

"In addition to furnishing warehousing services the rail carriers, or their subsidiaries, also rent space in stations, piers, or warehouse buildings to certain ship-

pers for various purposes, and the rental exacted is not only below the prevailing rates but is noncompensatory." 198 I. C. C. 198 (R. 107).

"It is also the general practice of the respondents (except the Central Railroad Company of New Jersey) to assume liability for actual loss or damage by fire, not to exceed the declared value, at a rate of 8 cents per \$100 of value per annum. This is much below the rates ordinarily prevailing for such insurance, and in instances where the carriers reinsure they are compelled to pay a higher rate and bear the difference." 198 I. C. C. 199 (R. 108).

"The New York Central leased to the Mellish Company a warehouse building known as the Old Sheep House and the first and second floors of the building known as the Rossiter Stores at an annual rental of 6.25 cents per square foot of space per annum, which is from one eighth to one tenth of the usual rate obtained for warehouse space in New York City." 198 I. C. C. 176 (R. 81).

"A letter from the president of the Erie to the vice-president pointed out the fact that a loss of \$83,866.65 had been sustained in the expense of labor and storage of 46,693 tons in these (Lorillard and Ault-Wiborg) buildings in 1931. This amounted to \$1.80 per ton. Inquiry was made, 'How long have the present storage and handling charges been in effect? Is there any reason why they should not be increased to more nearly cover the expense?' The vice-president replied:

These tariff charges have been in effect without change for a number of years. . . . They are less than warranted by regular commercial warehouse storages but contemplate revenue consequential upon road-haul movement of traffic. While these low rates have been complained of by private warehouse owners there has been no way found as yet for advancing them." 198 I. C. C. 186 (R. 93-94).

"The record shows that the Erie has paid the U. S. Trucking Corporation 6 cents or more 100 pounds for trucking goods to the Independent Warehouses, Incorporated, which were stored by the latter company in its warehousing business. Patrons of these warehouses may thus route their traffic over the Erie at a cost 6 cents or more per hundred pounds lower than shippers who patronize commercial warehouses which do not have the advantage of the railroad paying for the trucking thereto. The result is that business has been diverted to the Independent Warehouses, Incorporated, from other competing commercial warehouses." 198 I. C. C. 187 (R. 94).

"The vice president of the New York Central . . . expressed the opinion that any losses sustained in terminal operations might well be met out of revenue derived from all of the line-haul traffic, and cited competition for traffic among the carriers as one of the reasons for building warehouses and the measure of the charges for storage." 198 I. C. C. 191 (R. 99).

"The vice president of the Lackawanna . . . testified that it is reasonable to conclude that the only reason for the Lackawanna's low charges for westbound storage was the competition of other carriers. The witness, speaking of the low charges, stated: 'I don't think any one can say that there is any money to be made out of this, . . . there is no use to beat around the bush, this storage over here does not pay its way.'" 198 I. C. C. 191 (R. 99).

"The rail carriers directly or through dominated and controlled subsidiaries seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen. It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation." 198 I. C. C. 197 (R. 105).

"While some changes in the practices and charges were made before and subsequent to the issuance of the prior report, most of the practices and charges therein condemned have not been corrected. The present practices and charges, as later shown, result in heavy losses not only to respondents, but also to competitive commercial warehouse companies . . . this excess capacity and resulting competition have reduced the cold-storage warehouse rates for handling and storage to subnormal levels." 216 I. C. C. 295 (R. 125).

"Because of the competition it is difficult, if not impossible, to adhere to any fixed standard of rates for storage or the rental of space." 216 I. C. C. 296 (R. 126).

"The Kraft company through its control of a large volume of traffic, has, since January 1929, been able at all times to obtain space for its operations at rates which are wholly noncompensatory to the railroads' warehouse companies. The granting of concessions by carriers through the leasing of space at rentals less than its fair value is as unlawful as any other form of rebating." 216 I. C. C. 308 (R. 141).

"At the further hearing a warehouse operator who is a shipper in interstate commerce testified that the competitive situation between the independent warehouses and the railroad warehouses had become progressively worse since the prior hearing, that the Central Warehouse Company is among his competitors, and that shortly before the later hearing his warehouse had lost considerable business to the Central Warehouse Company because the latter's rates were cut to a point where they could not be met by his company. He further testified that his rates were not abnormally high to begin with, and that he offered to lower them, at first 10 percent and eventually 20 percent, in order to retain the business, but that the Central Warehouse Company obtained the business by

offering storage rates and handling charges, averaging 48.47 and 63.74 percent, respectively, below the storage rates and handling charges of his company." 216 I. C. C. 322-323 (R. 158).

"The record is conclusive that through existing arrangements the respondents have provided flour-storage space at less than cost. In fact, it was testified at the former hearing that, through the practice of respondents in leasing their storage facilities to trucking or stevedoring companies, it is possible for flour merchants in New York City to avoid bearing any expense for such storage. Under such circumstances it is of course clear that the operators of commercial warehouses are unable to compete successfully for the business of storing flour." 216 I. C. C. 338 (R. 176-177).

"The arrangements, therefore, must be construed as a device to purchase traffic through the rental of space at noncompensatory rates, and by the payment of allowances for services which are a part of the commercial activities of those companies. The testimony shows, and it is almost self-evident, that commercial warehousing companies engaged in the storage of automobiles received in carload lots by rail are unable to successfully compete for that business when faced by the competition of the storage companies subsidized by the New York Central." 216 I. C. C. 331 (R. 168).

The unsuccessful efforts of the B. & O. Railroad Company to maintain commercial storage rates, when faced by the "cut-throat" competition of the other appellants is vividly portrayed in this record. 198 I. C. C. 147-149; 216 I. C. C. 298-302 (R. 45-48, 129-134). Consideration of that losing struggle of the Baltimore and Ohio is persuasive of the view that an order of the Commission licensing these competing carriers to establish rates or rents reflecting the judgment of their traffic departments as to fair value or

reasonable worth instead of arresting would stimulate their unlawful efforts. It is very plain that the case in hand is one in which the findings and order of the Commission must bar rates and rents that fail to compensate the appellants or there will be no limitation of the descent of appellants' subnormal rates and rents.

From the findings it appears that the appellants, departing from their common carrier functions, at a recent time invaded the warehouse business. Their purpose was to buy traffic, in competition with each other, by utilizing this private business to convey rebates and concessions to shippers. The inevitable outcome of such misuse of the warehousing business would be a progressive and continuing reduction of rates and rents which cannot be arrested except by a cost of service barrier. Descent below the rate standards of the competing private warehousemen and all other respectable standards was and is inevitable because the schemes of the railroads would not accomplish the buying of traffic unless and until the appellants transformed warehouse rate and rent structures into instrumentalities that yielded the essential rebates and concessions. Under the deplorable conditions created by the appellants, who now dominate the New York warehouse market, any rates and rents which the appellants elect to impose are prevailing, fair value or reasonable worth rates or rents conforming with appellants' doctrine.

Two conclusions are inescapable. The Commission cannot compel any corrective action of substance except through incorporation, in its findings and order, of the condition or limitation which is challenged by the appellants. The removal of that limitation by the Courts will license the appellants to continue and augment every phase of their

reprehensible practices which were condemned by the Commission.

The appellants have not shown a scale of rates or even one rate which they deem to be reflective of "fair value" or "reasonable worth." Their argument left us uninformed as to any level of rates which they may have in mind.

As the Commission gave appropriate consideration to every element of rate and rent making that deserved consideration no grounds for setting up this collateral attack upon the findings and order are available. The appellants had their opportunity to urge this issue in the proceedings before the Commission and if they failed to embrace it they cannot raise the issue *de novo* now. *United States v. Northern P. R. Co.*, 288 U. S. 490, 494. We very earnestly insist that the appellants can have no recognizable grounds for raising this complex question of fact and law except through specific assignment of error to findings of fact. *Mississippi Valley Barge L. Co. v. United States*, 292 U. S. 282, 286; *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 148. On page 7 of their brief they expressly disclaim such grounds.

The findings and order of the Commission being sound in law and having substantial support in evidence should be sustained by this Court. *Chicago, R. I. & P. Ry. Co. v. United States*, 274 U. S. 29, 33-34, *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663.

Passing now to the third contention urged under appellants' Point 1. According to our understanding the appellants argue that any concession or rebate cannot have the effect of reducing carrier rates below the published tariff scale, in violation of Section 6(7) of the Act, unless the rebate or concession is of substantial and measurable value to the shipper to whom the rebate or concession is given. Thus, as argued by the appellants, the below cost finding

which applies only to a condition affecting the carrier, is insufficient in law to make out a violation of Section 6(7) of the Act.

Appellants' argument is untenable. The Commission's reports and findings repeatedly show the amounts of rebates and concessions which are of great value to the preferred shippers. The figures are set forth many times in the Commission's reports in dollars and cents per-ton of freight handled or stored and in total amounts for specified periods of time. And there are several instances in which large amounts of shippers' rents and shippers' insurance premiums which were improperly assumed by the appellants, are stated in dollars and cents. A suggestion that the assumption by the appellants of shippers' warehousing services, rents and insurance premiums conveyed nothing of value to the shipper would be palpably absurd and contrary to the unchallenged findings of fact. Surely the appellants would not undertake such radical departure from common carrier functions unless the innovation provided ample inducements and conveyed value sufficient to buy the shippers' traffic.

Turning now to the wording of the statute. The test of legality set up by Section 6(7) of the Act, is not directed to effects upon the shipper. If the device or practice reduces the carriers' published rates that effect upon the carrier consummates the violation.

In *United States v. American S. & T. Plate Co.*, 301 U.S. 402, this Court gave consideration to violations of Section 6(7) of the statute arising from the assumption by common carriers of the performance of shippers' switching services. In short, the carriers stretched their regular rates for transportation beyond the scope of common carriage to cover certain shippers' services, thereby violating Section 6(7) of the Act. The violations of this section in the case

in hand are more aggravated. The assumption by the appellants of large portions of shippers' commercial warehouse expenses, rents and insurance premiums as an inducement which influenced the shippers to route their freight traffic over the lines of the appellants is a clear cut reduction of appellants' filed tariff rates in violation of Section 6(7) of the Act. No other form of rebate or concession could be more efficacious or pernicious. The practice is an adroit and facile method of rebating through which the rebate can be made as large or small as the carriers and preferred shippers desire.

One more contention of the appellants, under their Point 1, remains for discussion. Appellants contend that the only foundation for the findings of violations of Sections 2 and 3(1) of the Act is the erroneous finding of violations of Section 6(7) of the Act. We have shown that error is not attributable to the findings last mentioned. Appellants' rates to or from the preferred warehouse operations are reduced below the filed tariff level by appellants' assumption of a large part of the shippers' warehousing expenses. Appellants imposed their unreduced filed tariff rates on the traffic of the competing warehouse company. The resulting inequality of rates for like transportation service affords ample foundation for consideration of the additional factors of discrimination.

The Commission made comprehensive findings of unjust discrimination against, and undue prejudice to, the many complaining warehouse companies, in violation of Sections 2 and 3(1) of the Act. These findings are sufficiently outlined in our statement of the case. In its report the Commission mentioned the failure of the appellants to refute our evidence of unjust discrimination and undue prejudice. And that is their position here—they argue the issue of unjust discrimination and undue prejudice without even

referring to these findings or the serious injury to the business of the complaining warehouse companies.

2. The Findings that the Appellants Store Goods for Shippers at Less than Costs of the Service are Sufficient in Law.

In their Point 2 the appellants argue that the Commission made bare findings that appellants' rates for storage being below costs of service levels were, for that reason alone, unlawful under the Interstate Commerce Act. Appellants urge that the findings are insufficient in law.

The Commission did not make such attenuated findings. The Commission dealt with the corrupt inception and purpose of the subnormal storage rates and condemned the "below cost" rates as one of the steps which consummated the giving of unlawful concessions in violation of the statute. Our argument of appellants' Point 1 will serve to answer appellants' Point 2.

3. The Fact that Appellants Published some of Their Rates for Non-transportation Storage in their Filed Tariffs does not Alter the Substance or Change the Law.

The appellants urge several contentions under their Point 3. Their Point 3 is confined to rates for storage published in their filed tariffs. Their Points 1 and 2 dealt with rents and rates for storage that were not published in their filed tariffs.

We have hereinbefore discussed all of the points urged under appellants' Point 3 except storage in transit and the tariff publication of storage rates. Our position is that the publication in appellants' filed tariffs of rates for the so-called in-transit storage, which is not transportation serv-

ice, does not distinguish that class of storage from the mass of similar storage, argued in appellants' Points 1 and 2, for which the appellants did not file any tariff rates.

Appellants' argument suggests that the term "storage in transit" indicates that such storage is customarily embraced in transportation service. The term does not have that significance. Storage in transit, like milling in transit, is an activity of private business performed for the benefit of manufacturers, traders or others. The railroads merely outline a transit privilege and period in their tariffs and the traders or other private business concerns perform the trade activities during the transit period. The assumption of storage by the railroad companies during the transit period is as foreign to transportation as the assumption by them of the grinding of grain or the sawing of lumber during transit periods would be.

On the point under discussion the Commission said:

"Storage in transit permits the stopping of goods at an intermediate point en route and the reshipping therefrom to final destination at the through rates instead of the higher combination of local rates, to and from the transit point, which would obtain if the transit privilege was not granted. The transit privilege ordinarily is for the purpose of permitting some milling, manufacturing, or other trade process to be performed to the goods during the transit period.

Each of the seven trunk-line respondents provide transit rules and rates for the storage of westbound freight at their warehouses in the Port of New York district, but these rules and rates vary greatly from the generally accepted storage-in-transit practices in the following particulars. The owners of the stored freight may, and oftentimes do, sell it locally, remove it by trucks or other means, withdraw it from consumption at any time or in any quantity by means suiting their business needs or inclination. Furthermore, if

the goods remain in storage beyond the time limit imposed for in-transit storage the rates for storage remain the same as applied during such period. In the particulars named the storage partakes of the nature of commercial storage, and the storage involved is not, properly speaking, in-transit storage. The fact that it is designated as such in the carriers' tariffs does not invest it with the characteristics of in-transit storage." 198 I. C. C. 196 (R. 105.)

"It should be borne in mind that certain carrier-controlled warehousing facilities are not available to the general public, but only to selected concerns controlling large volumes of traffic. The tariffs provide that arrangements for storage space for westbound shipments in or on railroad piers or warehouses must be made in advance with respondents, or with outside warehouses if stored therein." 198 I. C. C. 197 (R. 106).

Contrary to appellants' argument the Commission again, in its third report, held that the storage in question is not a component of railroad transportation service. The Commission said:

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act." 220 I. C. C. 103-104 (R. 271).

It appears from the above quotations that the Commission, upon the evidence of record, found that the so-called

in-transit storage was not railroad transportation service and that appellants' tariffs did not transform the trade service in-transit storage into common carrier transportation service. The Commission also pointed out that appellants' tariffs did not offer such storage services to the general shipping public but purported to confine the services to selected shippers. Other decisions are to the effect that writings in railroad tariffs will not alter facts or established law. *Merchants Warehouse Co. v. United States*, 283 U. S. 501; 508, 511; *North Packing & Provision Co. v. C. M. & St. P. Ry. Co.*, 80 I. C. C. 737, 740; *A. T. & S. F. Ry. Co. v. Kansas City Stock Yards Co.*, 33 I. C. C. 92.

The Commission's statutory authority to prescribe rates does not apply to rates for non-transportation services. It cannot entertain a complaint directed to such rates nor fix the measure of such rates. And there is no statute which compels the appellants to adhere to such rates even when the rates are printed in appellants' filed tariffs. The Commission cannot make any use of such tariffs, which are impotent and virtually worthless.

In its third report in this case the Commission permitted the appellants to incorporate rates for the so-called in-transit storage in their filed tariffs. But as indicated in the above quotation from that report the Commission reiterated its finding that the services were non-transportation services. In exceptional cases the Commission will permit carriers to incorporate rates for non-transportation services in their filed tariffs for the purposes of affording information. The Commission's views on this point are well stated in *Tariffs Embracing Motor Truck or Wagon Transfer Service*, 91 I. C. C. 539, 548-549, from which we quote as follows:

"In the interest of simplicity of tariffs, it has been our practice to discourage publication in tariffs of mat-

ter other than that necessary to comply with the act and our regulations. However, in view of the circumstances surrounding the motor-truck, water, and rail transportation under consideration, carriers may, if desired, include in their tariffs naming rates to or from New Haven the charges of motor trucks for the service from such inland points to New Haven, provided such charges are separate from the charges subject to the act. . . . Nothing here said should be construed as general authority to carriers subject to the act, as generally it is undesirable to complicate tariffs by including therein foreign matter, and each case should be determined by its particular circumstances."

The incorporation of rates for the non-transportation storage service in appellants' tariffs is immaterial. The findings of the Commission on this point are conclusive. *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 508; *Terminal Warehouse Co. v. United States*, 31 F. (2d) 951, 957. Our argument of appellants' Point 1, therefore, applies with like force to the contentions of appellants' under their Point 3.

4. The Commission's Order will not Deprive Appellants of their Liberty and Property.

In their Point 4 the appellants argue that the Commission's order will deprive them of their liberty and property in contravention of the Fifth Amendment to the Constitution of the United States.

Appellants' argument is unique. It is the first instance coming to our attention in which the Fifth Amendment has been invoked to enable any party to continue to carry on business at rates or selling prices below costs.

On its face appellants' contention is self-contradictory. They need a record of evidence to lift their Point 4 from the

self-contradictory stage—that is, evidence which will prove that below cost rates may be profitable under certain exceptional circumstances. Here again we insist that appellants are foreclosed by their action in expressly refraining from challenge to the evidence and findings of fact.

Appellants' argument is inconsistent. No constructive or beneficial purpose was served by their invasion of the commercial warehouse business. With indifference to the destructive effect of their invasion upon the property and established business of the many private business concerns who had been lawfully engaged in that business for many years in the New York District, the mandate of these powerful railroad corporations was and is that no one can have the competitive part of that business except at rates and rents below costs of service. In short they deprived the competing non-railroad warehouse companies of the opportunity to obtain any profit or fair return on their warehouse properties or their established business. And we are confronted with appellants' paradoxical argument that the Fifth Amendment to the Constitution licenses them to continue this confiscation and destruction of the property and going business of these many non-railroad warehouse companies.

If the appellants may invade and thus destroy the commercial warehouse business they may also invade and destroy the refinery, manufacturing, wholesaling, retailing and all other kinds of private business that is dependent on them for essential transportation service.

5. The Appellants Ignored the Efficiency and Economy Provisions of the Statute.

The Commission made important findings in recognition of the efficiency and economy provisions of the Interstate Commerce Act. See 198 I. C. C. 202 (R. 113).

The appellants and other carriers have appealed to the Commission repeatedly to authorize general increases of their rates. In one of these cases, *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 585-586, after authorizing the increases, the Commission said:

"The new competitive conditions make it necessary, also for the railroads to coöperate more efficiently with each other and reduce the waste, both in service and in rates, which has marked their own competition. That this waste is of very large proportions is clear. Many specific instances have been brought to our attention. That it can be minimized we also have no doubt, but that this will require a greater degree of cooperation than the railroad executives have yet been willing to put into practice is plain. Such cooperation, which we believe the times make essential, would also be of great advantage in carrying on adequate research and experimentation." (178 I. C. C. 585.)

"In the meantime we have under way an investigation, Ex parte No. 104, into such railroad practices as may adversely affect net earnings, and we shall pursue this inquiry with diligence." (178 I. C. C. 586.)

The foregoing outlines the foundation of the proceeding in Ex Parte 104 from which the order challenged by the appellants emanated. Undoubtedly the dissipation of funds and revenues of these common carriers in non-transportation ventures is of great importance especially in the light of the Commission's duty in authorizing general increases of transportation rates and approving Government loans to these carriers.

The provisions of Section 15a(2)³ of the Interstate Commerce Act, relating to efficiency and economy in railroad management, are mandatory and must be given effect by the Commission. It may be assumed that the Commission's findings will compel rates and rents which are fair when

tested by these and the other pertinent provisions of the statute. Appellants' argument ignores the findings under these important provisions of the statute.

Conclusion.

When summarized the contentions of the appellants are a moot or theoretical argument of so-called fair value rates and rents supplemented by an argumentative and unfair curtailment of the Commission's comprehensive findings. This combination does not warrant annulment of the many well-grounded findings of the Court below or the Commission's findings or order in any respect.

The petition should be dismissed with costs upon appellants.

Respectfully submitted,

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APPENDIX A.

The following are the portions of sections 2, 3, 6 and 15a of the Interstate Commerce Act involved in this case:

Sec. 2. (U. S. Code, title 49, sec. 2.) That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. (U. S. Code, title 49, sec. 3.) (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 6. (U. S. Code, title 49, sec. 6.) (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 15a. (U. S. Code, title 49, sec. 15a.) (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of

rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

APPENDIX B.

COMPLAINING WAREHOUSE COMPANIES LISTED IN EXHIBIT No. 150.

- (A) indicates operators of non-refrigerated warehouses.
(B) indicates operators of refrigerated and non-refrigerated warehouses.
(C) indicates operators of cold storage warehouses.

Name	Location of Warehouse
(A) Vestry Warehouse, Inc.	Manhattan, N. Y.
(A) Mercantile Warehouse Corporation	Manhattan, N. Y.
(A) White Warehouses, Inc.	Manhattan, N. Y.
(A) Security Storage Warehouse	Harrison, N. J.
(A) Metropolitan Warehouse Co., Inc.	Carlton Hill, N. Y.
(B) Hall St. Cold Storage Warehouse, Inc.	Brooklyn, N. Y.
(C) Loomis Cold Storage Co.	Manhattan, N. Y.
(C) Greenwich Refrigerating Co., Inc.	Manhattan, N. Y.
(A) Bowne-Morton Stores, Inc.	Brooklyn, N. Y.
(B) Butlers Warehouses, Inc.	Brooklyn, N. Y.
(B) India Wharf Storerooms	Brooklyn, N. Y.
(A) South Eleventh St. Warehouse Corporation	Brooklyn, N. Y.
(A) Waterfront Warehouse & Terminal Corp.	Brooklyn, N. Y.
(B) Bronx Refrigerating Co.	Bronx, N. Y.
(C) Brooklyn Bridge Freezing & Cold Storage Co.	Manhattan, N. Y.
(A) Continental Milling & Warehouse Co., Inc.	Staten Island, N. Y.
(C) Fulton Market Refrigerating Co.	Manhattan, N. Y.
(A) W. R. Royce & Son, Inc.	Manhattan, N. Y.
(C) Heermance Storage & Refrigerating Co.	Manhattan, N. Y.
(A) Harper Bros., Inc.	Hackensack, N. J.
(A) Reisch Trucking & Trans. Co., Inc.	Morsemere, N. J.
(A) Campbell Stores	Hoboken, N. J.
(A) Elasticap Company	Hoboken, N. J.
(B) Jersey City Cold Storage Co., Inc.	Jersey City, N. J.
(C) Merchants Refrigerating Company	Manhattan, N. Y.
(C) Merchants Refrigerating Company	Jersey City, N. J.
(C) Merchants Refrigerating Company	Newark, N. J.
(A) Baker and Williams,	Manhattan, N. Y.
(C) National Cold Storage Co., Inc.	Brooklyn, N. Y.

Name	Location of Warehouse
(B) National Cold Storage Co., Inc.	Jersey City, N. J.
(C) Union Terminal Cold Storage Co., Inc.	Jersey City, N. J.
(C) Kings County Refrigerating Co.	Brooklyn, N. Y.
(C) Manhattan Refrigerating Company	Manhattan, N. Y.
(A) Lincoln Terminal Corporation	Kearney, N. J.
(A) Essex Warehouse Co.	Newark, N. J.
(A) Lehigh Warehouse & Transportation Co., Inc.	Newark, N. J.
(A) Long Island Storage Warehouse, Inc.	Brooklyn, N. Y.
(A) Rex Warehouses, Inc.	Manhattan, N. Y.
(A) Sunset Warehouses, Inc.	Manhattan, N. Y.
(B) Terminal Warehouse Co.	Manhattan, N. Y.
(A) John B. Hobby Sons Co.	Manhattan, N. Y.
(B) A. B. C. Warehouse Co.	Manhattan, N. Y.
(A) Port Warehouses, Inc.	Manhattan, N. Y.
(A) Shephard Warehouses, Inc.	Manhattan, N. Y.
(A) Henry I. Stetler, Inc.	Manhattan, N. Y.
(C) Stevenson Refrigerating & Storage Co., Inc.	Manhattan, N. Y.
(A) Charles C. Tough Warehouses, Inc.	Manhattan, N. Y.
(A) Towers Warehouses, Inc.	Manhattan, N. Y.
(C) United Refrigeration & Terminals Co., Inc.	Manhattan, N. Y.
(A) Commercial Stores, Inc.	Manhattan, N. Y.
(A) North River Stores, Inc.	Manhattan, N. Y.
(A) Hoboken Dock Co.	Hoboken, N. J.
(A) U. S. Testing Co., Inc.	Hoboken, N. J.
(A) Globe Fireproof Storage Warehouse Co.	Manhattan, N. Y.
(C) Atlantic Coast Fisheries Co.	Manhattan, N. Y.
(A) Coulter & Coulter, Inc.	Jersey City, N. J.
(C) Loewer Cold Storage Corp.	Manhattan, N. Y.
(A) Mulligan Midtown Warehouse, Inc.	Manhattan, N. Y.
(C) Standard Cold Storage Corp.	Manhattan, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *et al.*,
Appellants,
vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR CITY OF BOSTON AND BOSTON
PORT AUTHORITY, APPELLEES.

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BRIEF FOR CITY OF BOSTON AND BOSTON
PORT AUTHORITY, APPELLEES.

I.

Opinions.

The opinion of the specially constituted District Court is reported in 20 Federal Supplement 273 and a concurring opinion of Judge Hulbert in 20 Federal Supplement 917. These opinions are set forth in the Record beginning at page 302. The Court made and filed findings of fact and conclusions of law, which appear in the Record, beginning at page 341.

The general report of the Interstate Commerce Commission, announcing certain governing principles is reported in *Ex Parte No. 104, Practices of Carriers Affecting Operating*

Revenues or Expenses, Part VI, Warehousing and Storage of Property, by Carriers at Port of New York, N. Y., 198 I. C. C. 134. This report is set forth in the Record at pages 29 to 115. Supplemental reports in said proceedings are reported in 216 I. C. C. 291 and 220 I. C. C. 102. These reports are set forth in the Record at pages 120 to 199 and 269 to 271, respectively. The order involved in the above-entitled cause was entered in connection with the last-referred-to report. (R. 272-274.) All said reports are referred to in said order and made part thereof.

II.

Jurisdiction.

The Final Decree of the District Court was entered March 23, 1938. (R. 406.) Petition for Appeal was entered and allowed May 3, 1938. (R. 406-412.) Paragraph I of Rule 12 has been complied with and an order was entered on October 10, 1938, noting that probable jurisdiction had been shown.

III.

Statement of the Case.

This proceeding is a direct appeal from a final decree of a specially constituted District Court which dismissed Appellants' bill to enjoin and set aside an order of the Interstate Commerce Commission.

As the Statement of the Case set forth by Appellants in their brief (Appellants' Brief, pages 2 to 7) does not in the judgment of these Appellees adequately state the facts, the following statement is submitted:

1. Proceedings before the Commission:

On July 6, 1931, the Commission instituted an investigation on its own motion in a proceeding entitled — *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenue*

or Expenses — for the purpose of determining whether certain carriers, including the Appellants herein, parties, to said proceeding, were being operated economically and efficiently within the provisions of sections 12 and 15a of the Interstate Commerce Act. (R. 25.) While said proceedings were pending, warehouse operators located in New York filed complaints with the Commission especially directing attention to the warehousing practices of carriers serving that district, including the Appellants, and requesting an investigation into such practices. (R. 31.)

On January 6, 1932, the Commission instituted such investigation on its own motion, designating the proceeding as *Part VI* (of said *Ex Parte* No. 104), *Warehousing and Storage of Property by Carriers at Port of New York, N. Y.* Appellants were named as parties respondent. (R. 26-28.)

After extended hearings and the presentation of voluminous evidence, oral and documentary, and after argument, the Commission on December 12, 1933, issued its first report in said proceeding. (R. 29-115.) In this report extended findings were made to the effect that each of the Appellants herein, directly or through controlled subsidiaries, engages extensively in the commercial warehousing and storage business in the Port of New York District; that in the course of that business each renders warehousing and storage services and services incidental thereto to certain shippers at less than the cost to Appellants of rendering the same; that the purpose of these below cost services is the inducement of shippers to use Appellants' respective lines and that not all shippers receive these services and facilities, but some, including competing warehousemen, are substantially injured thereby. The Commission further found that while certain storage afforded by Appellants was provided for in tariffs and described therein as in-transit storage, this storage was not in fact an in-transit service, but was a commercial service under the guise of a transportation service. (For record references to these findings see V, Point I, B, *infra*, pages 11 to 25.) No order was issued at

the time but Appellants were admonished that their practices and charges should be adjusted in conformity with the principles announced in the report. (R. 113.)

Conformity with the principles so announced was not secured (R. 122), and by order dated May 6, 1935, the proceeding was reopened. (R. 117-119.) Further hearings were duly held and voluminous evidence again introduced. On June 8, 1936, the Commission issued its second report (R. 120-199.) This report contained further detailed findings with regard to the warehousing and storage practices of each of the Appellants. The Commission again found that each of the Appellants, either directly or through controlled companies, was engaged in the commercial warehouse and storage business in competition with and to the injury of other commercial warehouses in the Port of New York District; that certain shippers received these commercial services and others did not; that this business was conducted at a loss and that it was conducted with the purpose of attracting traffic to its line. The Commission again found that so-called in-transit storage was not a transportation service but was a commercial service, and part of the warehousing and storage business in which the Appellants were engaged. (For record references to these findings see V, Point I, B, *infra*, pages 11 to 25.)

The Commission concluded that the commercial warehousing and storage practices described, constituted violations of sections 2, 3 and 6 of the Interstate Commerce Act. (49 U. S. C., §§ 2, 3, 6.) A cease and desist order was entered (R. 199-201), but did not become effective. (R. 266-268.)

After the issuance of this report and rehearing upon the Appellants' petition, the Commission issued a third report (R. 269-271.) In this report the Commission said:

* The relevant portions of these sections and of sections 15 (13) and 16 (8) of the Interstate Commerce Act (49 U. S. C., §§ 15 (13) and 16 (8)) also deemed relevant are printed in the Appendix, pages 47 to 49.

"We find the facts as stated in our previous reports to be correct, and those findings and conclusions of law with respect to the above matters are reaffirmed."
(R. 270.)

While it reversed its prior determination that Appellants should cancel their so-called storage in-transit tariffs, it renewed its finding that the storage services rendered thereunder were commercial services. (R. 271.)

With this report the Commission entered its order of February 2, 1937. (R. 272-274.) This is the order involved in the present appeal.

The order directs each of the Appellants to cease and desist and abstain from:

"* * * permitting shippers in interstate commerce over said respondents' lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by, or affiliated with said respondents in the Port of New York district, at rates and charges which fail to compensate said respondents for the cost of providing said space.

"* * * storing goods shipped over said respondents' lines in interstate commerce; or providing storage space to shippers in interstate commerce over said lines for commercial storage of goods, as fully defined in said reports at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space.

"* * * directly or indirectly handling goods incident to commercial storage as fully defined and described in said reports, at said warehouses, buildings or piers for shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost of said handling.

*The term — respondents — is used throughout the three reports of the Commission to designate the seven carriers who are Appellants herein, namely, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company.

"* * * insuring goods shipped over said respondents' lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York district for shippers in interstate commerce at less than the cost of providing such insurance.

"* * * applying, by means of tariffs now on file with this Commission * * *, non-compensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports."

The effective date of said order was by subsequent orders postponed until November 13, 1937.

In view of the importance of the fact findings of the Commission, basic findings which support its order are elaborated in Point I of the Argument, hereinafter made (*infra*, pages 9 to 25).

IV.

Summary of Argument.

1. The Interstate Commerce Commission has made the following basic findings:

(a) Each of the Appellants is engaged in the commercial warehouse and storage business in the Port of New York District and, in the course of that business, renders to certain shippers warehouse and storage services and services incidental thereto;

(b) The commercial warehouse and storage services rendered by Appellants are rendered at rates and charges below the cost to Appellants of furnishing the same.

(c) These commercial services are made available by Appellants for the purpose of inducing traffic movement over their respective lines.

(d) Not all shippers over Appellants' lines receive these commercial services. Some shippers, including competitors of Appellants in the warehouse and storage business, are substantially injured thereby.

2. The Commission having made the findings hereinabove set forth, and these findings being supported by evidence, they establish the facts found. (*Florida v. United States*, 282 U. S. 194, 215 (1930).)

3. The rendering by Appellants, in the course of the commercial warehouse and storage business undertaken by them, of warehouse and storage services to certain shippers at less than cost, constitutes an unjust discrimination against and undue prejudice to competitors of Appellants in the commercial warehouse and storage business, who are shippers over Appellants' lines, in violation of sections 2 and 3 of the Interstate Commerce Act (49 U. S. C. §§ 2, 3). Such practices also constitute a departure from Appellants' transportation rates in violation of section 6 (49 U. S. C. § 6). Appellants' losses in their commercial business are met out of their transportation revenue. This in effect diminishes their transportation rates. Their competitors in the warehouse business must when shipping pay the full transportation rates, undiminished by commercial losses. (*New York, New Haven and Hartford Railroad Company v. Interstate Commerce Commission*, 200 U. S. 361 (1906).)

4. The rendering by Appellants of commercial services to certain shippers below cost for the purpose of inducing the movement of traffic over Appellants' respective lines, is a traffic-buying technique which results in unjust discrimination and undue preference in violation of sections 2 and 3 of the Act. It is immaterial whether or not certain of the shippers receiving such services pay full value therefor. Traffic may not be so bought. (*Lehigh Valley Railroad Company v. United States*, 243 U. S. 444 (1917).) The Commission found the source of the discrimination and prejudice to be the below-cost charges for commercial services. The Commission, therefore, properly enjoined the rendering of

such services at below-cost charges. (*Merchants Warehouse Company v. United States*, 283 U. S. 508 (1931).)

5. The rendering by Appellants of commercial warehouse and storage services below cost to certain shippers for the purpose of inducing traffic movement results in a departure by Appellants from their published transportation rates in violation of section 6 of the Act. Commercial losses are met out of those rates, thereby in effect cutting the rates. Unjust discrimination against and undue prejudice to all shippers over Appellants' lines who receive similar transportation services but do not receive the below-cost services result in violation of sections 2 and 3. Such shippers must pay the transportation rate undiminished. (See *New York, New Haven and Hartford Railroad Company v. United States*, 200 U. S. 361 (1906).)

6. Publication in tariffs of certain of these below-cost commercial services and of the charges therefor does not make the services transportation services or prevent their below-cost nature from effecting a departure from Appellants' transportation rates in violation of section 6. As the charges are below-cost, the loss must be met out of Appellants' transportation rates. This effects the violation of section 6. (*United States v. American Tin Plate Company*, 301 U. S. 407 (1937). *United States v. Pan American Petroleum Corporation et al.*, 304 U. S. 156 (1938).) The tariffs are not in fact open to all. Publication, therefore, does not prevent a violation of sections 2 or 3.

7. The Commission's order is a valid exercise of the Commission's power to prevent unjust discrimination and undue prejudice in violation of sections 2 and 3 of the Act and to prevent departures from Appellants' transportation rates in violation of section 6. It is therefore not in conflict with the Fifth Amendment to the Federal Constitution (*Los Angeles Switching Case*, 234 U. S. 294 (1914) and *O'Keefe v. United States*, 240 U. S. 294 (1916)). The cost standard laid down is sufficiently certain (*Nash v. United States*, 229 U. S. 373 (1913); *Hygrade Provision Company v. Sherman*,

266 U. S. 497 (1925)); and only knowing violation of the order will result in the infliction of penalties (49 U. S. C., § 16 (8); *American Telephone and Telegraph Company v. United States*, 299 U. S. 232 (1936)).

V.

Argument.

POINT I.

Each of the Appellants is engaged in the commercial warehouse and storage business in the Port of New York District. In the course of that business each Appellant is rendering to certain shippers warehouse and storage facilities and services incidental thereto at rates and charges which are less than the cost of furnishing the same. These facilities and services are made available for the purpose of inducing the movement of traffic over the respective lines of the Appellants. Not all shippers over those lines receive these services. Some, including competitors of Appellants in the warehouse business, are substantially injured thereby.

A. The finality of the Commission's findings of fact.

As will hereafter be demonstrated the Commission has found each of the facts hereinabove recited under the heading — Point I.

This section of the Brief does not deal immediately with the validity of the order made by the Commission. It is concerned with an essential but subsidiary point — that is, with basic findings of fact of the Commission and the finality of those findings.

Findings of fact of the Commission, made after hearing and based upon evidence presented to it, are final.

As stated in *United States v. Louisville & Nashville Railroad Company*, 235 U. S. 314, 321 (1914):

"It cannot be otherwise since, if the view of the statute upheld by the Court below be sustained, the Commission would become a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

And as stated in *Florida v. United States*, 282 U. S. 194, 215 (1931):

"The Commission is the fact finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

It is true, as contended by Appellants (Appellants' Brief, p. 12), that an order of the Commission must be supported by findings of the basic or quasi-jurisdictional facts conditioning its power, but it is submitted that adequate findings supporting the Commission's order have been made by the Commission and that the Commission having made those findings, the facts as found are conclusively established.

This Court may, of course, if the Commission's findings of fact are challenged as unsupported by evidence, inquire as to their evidentiary basis. But Appellants in their appeal have not challenged the evidentiary basis of the facts found by the Commission. In their brief, they say at page 7:

"Appellants' position on this appeal is that the findings made by the Commission, taken at their full face value, are insufficient in law to sustain the order. Appellants' assignments of error are all to this effect. (R. 407.) They have not deemed it necessary to assign any errors with respect to the sufficiency of the evidence to support the Commission's findings and, therefore, the evidence is not included in the printed record on appeal. (R. 413-415.)"

It is, therefore, submitted that the findings of fact made by the Commission are final and establish the facts found.* Under Points II and III *infra*, we shall urge that the facts so found justify the order.

B. Basic facts found by the Commission.

1. Each of the Appellants is engaged in the commercial warehouse and storage business and in the course of that business renders to certain shippers warehouse and storage services and services incidental thereto.†

The Commission has found and it is undisputed by Appellants that Appellants render to certain shippers warehouse and storage services.

It is also undisputed that carriers may under some circumstances perform storage for shippers in the course of, and as necessarily incident to, transportation which is so related to the transportation duties of the carrier as to be incidental to transportation and as not to constitute engaging in the commercial storage and warehouse business.

Apart, however, from the question of whether Appellants do engage in the commercial storage and warehouse business or may properly do so, there can be no doubt that Appellants can (whether properly or not) in fact engage in such business.

Since Appellants can engage in the commercial warehouse and storage business as well as in the transportation business; when Appellants render warehouse and storage services, the question of whether Appellants are engaged

*In this connection it should be noted that the District Court made the following finding:

"3. The Commission's findings, as made in its reports of December 12, 1933, June 8, 1936, and February 2, 1937, are supported by adequate evidence and are sufficient support in law for the order of February 2, 1937." (R. 403.)

†The incidental services referred to are handling and insurance of freight stored under the so-called west-bound storage in-transit tariffs. Since the same principles govern these services as govern said storage, detailed discussion with reference thereto is omitted from this brief. The facts found with reference to these incidental services parallel the facts found with reference to the so-called in-transit storage. (R. 185-188; 192-196; 196-198.) The applicable law is the same.

in the commercial warehouse and storage business as well as in the transportation business is a question of fact.

The problem is analogous to that of whether certain carrier activities constitute a part of the performance of its transportation duties or are outside thereof and in addition thereto. Such matters have consistently been held to be matters of fact for the Commission:

United States v. American Tin Plate Company,
301 U. S. 402, 407, 408 (1937).

Los Angeles Switching Case, 234 U. S. 294, 311 (1914).

Merchants Warehouse Company v. United States,
283 U. S. 501, 508 (1931).

The question of fact, namely, are Appellants engaged in the commercial warehouse and storage business, has been resolved by the Commission. The Commission has found that Appellants are so engaged, and that, in the course of such business, they are rendering warehouse and storage services to certain shippers.

That the Commission has so found appears from the following quotations from its reports:

"It follows that we have authority to require the carriers to cease *engaging in the commercial warehouse business*, in cases where it is shown that the business is of such a nature that its conduct by the carrier necessarily results in violations of the law administered by the Commission." (R. 104.)

"The motive of the carriers *in engaging in the commercial business* is to induce shippers to use their rail facilities and thereby increase the volume of traffic over their respective lines." (R. 105.)

"The above question, as stated by the Court, can properly be paraphrased to cover the situation here presented, as follows: Has a carrier engaged in transporting commodities in interstate commerce the power to furnish directly or indirectly storage or warehousing facilities not within its common-carrier duty and to act as a private or commercial warehouseman when the amounts received * * * " (R. 110-111.)

"We shall deal first with warehousing operations of the respondents * * * which are in all respects *voluntary commercial warehousing activities such as 'are performed throughout the country by commercial warehousemen under and 'pursuant to their private contracts, arrangement and dealing with patrons of warehouses.'*" (R. 124.)

"*The engagement by the carriers in commercial warehousing under circumstances described of record affects the performance of their common-carrier duties * * **" (R. 180.)

"* * * *those respondents (appellants herein) have departed from the business of transportation and entered the business of commercial warehousing.*" (R. 191.) (Italics in the foregoing quotations have been supplied.)

The extent to which Appellants have gone in their warehousing and storage undertaking is indicated by the following findings of the Commission:

"At the time of the further hearing at least 22 warehouse companies operated cold-storage warehouses in that district. Up to the close of the year 1930, the cold storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in that district, and within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market. This was an increase of about 25 percent over the amount of space that had been put on the market by all of the public warehouses in that district during the preceding period of 50 years or more. At the time these two warehouses were opened for operation there was an unused occupancy of at least 30 percent of the then existing facilities; and at the time of the further hearing there was less than a 50 percent occupancy. This excess capacity and resulting competition have reduced the cold-storage warehouse rates for handling and storage to subnormal levels. At the time of the further hearing at least 43 warehouse companies operated merchandise warehouses, other than cold storage, in the Port of New York district. During a period of 70 years up to that time, these warehouse

companies had placed 20,450,000 square feet of warehouse space on the market in that district, and within six years subsequent to January 1, 1929, the respondents or their affiliates placed 6,185,000 square feet of additional merchandise warehouse space on the market thereby, without commercial need, increasing the capacity at least 25 percent." (R. 125-126.)

Appendices I, II and III to the Commission's first report (R. 113-115) further illustrate the extent of the commercial warehousing and storage practices of the Appellants. As stated by the Commission:

"By referring to appendix I it will be noted that seven of the carriers have expended over \$36,000,000 in connection with the warehouse projects considered herein, and appendix II shows the loss incurred thereon during 1931 was over \$1,260,441. Appendix III shows the loss per ton of freight stored in-transit ranges from \$1.28 to \$6.18. These losses are added to by losses incurred on freight stored on railroad piers, and in cargo on insurance premiums, and from loans and advances. The private warehouse interests estimate the total annual losses to be \$3,152,119.63." (R. 112.)

The first two reports of the Commission are replete with specific findings that Appellants are engaged in the commercial warehousing and storage business on a scale and under circumstances not related to transportation, except as a traffic-soliciting device. (See for example with reference to warehousing and leases R. 128, 129, 135; 71, 138, 142, 144; 56, 153; 52-53, 156-157, 159; 87; 77-78, 81; 167, 169; 172, 173, 175.)

The findings above quoted, as well as those referred to, indicate conclusively the commercial and non-transportation nature of Appellants' warehousing and storage operations. They show that the problem is not that of isolated leases of surplus space or occasional or incidental storage. The practices shown constitute commercial enterprise on a gigantic scale.

So-Called In-Transit Storage.

Inasmuch as Appellants have contended at length in their Brief (Appellants' Brief, pages 36 to 39) that their so-called in-transit storage was not found by the Commission to be and is not in fact part of the non-transportation business undertaken by Appellants, an analysis of the Commission's findings on this point follows:

Carriers commonly permit the stopping of goods at an intermediate point en route and the reshipment therefrom to final destination at the through rate instead of the higher combination of local rates to and from the transit point. Ordinarily this privilege is granted to enable milling, manufacturing or other trade process at the transit point. Such storage as occurs during the transit period is incidental to the purposes of the detention. What is done to the goods at the transit point whether they be milled, manufactured or subjected to other trade process, is not done by the carrier. The privilege granted by the carrier is fundamentally the privilege of the through rate.

See *Central Railroad Company v. United States*,
257 U. S. 247, 257 (1921).

It is clear that describing in tariffs a privilege as an "in-transit" privilege does not make it a transportation service, any more than describing in tariffs warehouses as public freight stations makes them public freight stations.

Merchants Warehouse Company v. United States
(*supra*) at 508;

see also:

United States v. American Tin Plate Company
(*supra*) at 408.

Should the carriers undertake to manufacture, mill or process at the transit point goods carried, the service would clearly not be transportation. It would be a commercial service regardless of the name by which called.

While storage may be incident to transportation it may also, as hereinbefore pointed out, constitute a commercial business. The Commission has found that in the instant case so called storage in-transit does constitute a commercial business.

In its first report, the Commission distinguished real in-transit privileges from the commercial practices engaged in by Appellants under the guise of an in-transit tariff, and found:

"Each of the seven trunk-line respondents provide transit rules and rates for the storage of westbound freight at their warehouses in the Port of New York district, but these rules and rates vary greatly from the generally accepted storage in-transit practices in the following particulars. The owners of the stored freight may, and often times do, sell it locally, remove it by trucks or other means, withdraw it from consumption at any time or in any quantity by means suiting their business needs or inclination. Furthermore, if the goods remain in storage beyond the time limit imposed for in-transit storage the rates for storage remain the same as applied during such period. In the particulars named the storage partakes of the nature of commercial storage, and the storage involved is not, properly speaking, in-transit storage. The fact that it is designated as such in the carriers' tariffs does not invest it with the characteristics of in-transit storage." (R. 105.)

In its second report the Commission further emphasized the commercial warehousing nature of Appellants' so-called in-transit services, and made the following findings:

" * * * the record is clear that those and other commodities are stored under circumstances which are not *bona fide* transit arrangements necessarily related to transportation services which it is the duty of the respondent carriers to perform. The circumstances and practices referred to are a part of the business necessary in conducting a commercial-warehouse enterprise. The engagement by the carriers in commercial warehousing under the circumstances described

of record, affects the performance of their common carrier duties and is of such character as to result in violation of the act which we are charged with administering. Prior report page 195." (R. 180.)

"Goods, including rubber, stored under the so-called transit tariffs, are unloaded from shipside and moved to warehouses under local rates. The goods remain in storage under so-called "expense bills." If shipped outbound from storage within the transit period, a refund is made of the local inbound freight charges, since the same through rate applies from shipside as from the warehouse. In spite of the fact that the storage of large quantities of certain of those commodities at the Port of New York was shown in the prior report to be a burdensome expense upon them, the respondents after the first hearing adopted the practice of extending the expiration date of the expense bills, thereby allowing the freight to remain in storage under the transit rates for longer periods than previously permitted. The reason given for this extension is that because of the generally depressed condition of business, the owners of freight stored under the transit arrangements are unable to sell their commodities and move them from the warehouses.

"The time limits were generally extended for 6-month periods, and through such practice it was possible for crude rubber to be stored a maximum of 30 months; unmanufactured tobacco 36 months, paraffin wax 24 months, and burlap, pig tin, cocoa beans, pepper, and senna leaves 18 months. * * * On May 20, 1935, however, the carriers extended the time limit an additional six months on expense bills covering paraffin wax. The above limits represent the time which the goods may remain in storage and receive the advantage of the through rate from shipside to destination. If the goods remain in storage for longer periods the storage rates remain the same, but the shipment is considered a local shipment from the transit point.

"When the prior report was issued, respondents' tariffs permitted the removal of commodities stored under transit storage rates at any time, in any quantity, and by any means of transportation. Effective October 16, 1934, a charge of 5 cents per 100 pounds in addition

to the accrued storage-in-transit charges was made to apply on commodities withdrawn from storage for movement by means other than over the railroad which granted the storage." (R. 181-182.)

"Numerous consuming points of the commodities previously mentioned are located within comparatively short distances from the Port of New York district. Present-day commercial necessities in the distribution of goods to a densely populated section require large amounts of warehouse space as a storage reservoir from which the goods may be drawn promptly and economically for consumption. It is a distinct commercial advantage to dealers and manufacturers to have storage facilities available at a central distributing point, rather than at scattered points, and commercial reasons account for the large tonnage of goods stored in the above district." (R. 188.)

"So far as this entire record shows, none — or practically none — of the westbound goods stored under the present tariffs are held to permit a milling, manufacturing, or other similar trade process to be performed, but are held in that convenient locality awaiting a time when it will be to the commercial interest of the owner to sell or further ship the goods. This is clearly proven by the fact that the transit period has been extended from time to time by the respondents because of inability of the owner of the goods to dispose of them, by reason of economic conditions. *The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function.*" (R. 189.)

"The fact that the carrier's tariffs designate the storage as in-transit storage was considered in the prior report, but we found that such designation did not invest this storage with the characteristics of storage in-transit. Tariffs are but forms of words, and in administering the act we can look beyond the forms to what causes them, and what they are intended to cause and do cause." (R. 190.)

"The consideration upon further hearing given to storage, under the tariffs now effective, in railroad owned or controlled warehouses, of the commodities

which have been mentioned in this report under the heading Storage of Westbound Carload Freight at New York, and others not specifically named herein, but similarly stored as described of record, leads us to affirm our previous findings and to here find that, to the extent that the respondents engage in the storage of those commodities under the practices heretofore discussed, *those respondents have departed from the business of transportation and entered the business of commercial warehousing.*" (R. 190-191.) (Italics in the foregoing quotations have been supplied.)

Appellants have urged in their brief that in its third report the Commission held that so-called in-transit storage was a transportation service in that it modified a prior order requiring the cancellation of the so-called in-transit tariffs.

This modification was made upon Appellants' petition for leave to continue the publication of its storage in-transit tariffs. (R. 270.) The petition was granted, but notwithstanding this the Commission clearly reasserted its previous finding and stated:

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act." (R. 271.) (Italics supplied.)

Whether the Commission was right in permitting the filing of these tariffs is not a matter of concern now. The Appellants were the moving parties in this regard. They requested permission to continue the filing of the tariffs. If the granting of the permission would, without more, have raised doubt as to certain prior findings of the Commission, that

doubt was removed by the above-quoted unequivocal language of the Commission's final report.

As hereinbefore stated, storage at a transit-point can be a commercial undertaking just as is milling or manufacturing. Whether or not such storage is a commercial undertaking, is a question of fact to be determined from all the circumstances by the Commission. Among the circumstances considered by the Commission in the instant case were the unlimited duration of the low-cost storage period (notwithstanding the expiration of the transit period), the application of the same storage rates notwithstanding the non-exercise of the transit privilege, the extent of the facilities so afforded, and the trade reasons for the granting thereof. The Commission has found the fact and its finding is final.

2. The commercial warehouse and storage services rendered by Appellants are rendered at rates and charges below the cost to Appellants of furnishing the same.

The Commission's finding that Appellants' warehousing and storage operations are conducted below cost has not been challenged in any respect.

The Commission has found that each of the Appellants furnishes commercial warehouse and storage services to certain shippers below cost. (For illustrative findings with reference to each of Appellants, see re The Baltimore & Ohio Railroad Company, R. 129-130, 134, 135; re The Delaware, Lackawanna & Western Railroad Company, R. 136, 137-138; 144-145; re Lehigh Valley Railroad Company, R. 151-152; re The Central Railroad Company of New Jersey, R. 157, 159; re Erie Railroad Company, R. 164; re The New York Central Railroad Company, R. 168, 169; re The Pennsylvania Railroad Company, R. 174, 175. For illustrative findings with reference to so-called storage in-transit services see R. 185-188; 196-197.)

3. The commercial warehouse and storage services rendered are made available by Appellants for the purpose of inducing traffic movement over their respective lines.

Here again the reports of the Commission are replete with findings that the motive of Appellants in furnishing commercial warehouse and storage services below cost is the inducement of traffic movement over their lines. (For example, see generally R. 35; and see re The Baltimore & Ohio Railroad Company, R. 128, 130-134; re The Delaware, Lackawanna and Western Railroad Company, R. 136-137, 140-141; re Lehigh Valley Railroad Company, R. 149, 152; re The Central Railroad Company of New Jersey, R. 155; re Erie Railroad Company, R. 163, 164; re The New York Central Railroad Company, R. 168; re So-called Storage in-Transit, R. 182, 190).

The following finding by the Commission is illustrative:

*"The motive of the carriers in engaging in the commercial business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. * * * It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation. * * * The conflict of interests is not confined to rail carriers and private warehousemen, but concerns also the rail carriers as between themselves. The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business."* (R. 105-106.) (Italics supplied.)

4. Not all shippers over Appellants' lines receive these commercial services. Some shippers, including competitors of Appellants in the warehouse and storage business, are substantially injured thereby.

(a) Not all shippers receive Appellants' commercial services.

Many shippers have no need for Appellants' commercial warehouse and storage services, and do not use the same.

As found by the Commission:

"Although the carriers charge all shippers alike the tariff rates for rail transportation, it is obvious that the according of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited by section 2 of the act. *It is likewise clear that the shippers receiving the benefit of such noncompensatory charges are given undue preference or advantage in violation of section 3 (1) of the act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefit.*" (R. 108-109.)

"In the instant case it is established that those persons who are able to avail themselves of storage and handling at the carrier's noncompensatory rates, and whose costs from shipside to destination are thereby reduced by the amount of the difference between compensatory rates and the noncompensatory rates, receive an undue and unreasonable preference or advantage over those persons whose commercial practices will not permit of their placing their goods in storage at New York, but require direct shipment from shipside to destination. Not only is the latter class of persons unduly or unreasonably prejudiced or disadvantaged, but such prejudice and disadvantage extends to all persons who are compelled to bear the carriers' transportation rates which are dissipated by their storage practices." (R. 192.)* (Italics in the foregoing quotations have been supplied.)

* Crude Rubber is one of the principal commodities stored under so-called in-transit tariffs (R. 180), yet the Commission has found:

"About 50 percent of the crude rubber imported through the Port of New York consists of so-called 'licensed rubber', sold on the rubber exchange, none of which is stored in railroad-owned or controlled warehouses. Of the remaining 50 percent, a considerable amount does not go into storage at New York, but is shipped directly from shipside to destination. The portion stored in respondents' warehouses is owned either by manufacturers or by rubber dealers and brokers." (R. 180.)

Shippers of this rubber do not receive the benefits of the below-cost service.

Furthermore, the Commission has found Appellants' commercial services are not only not of use to all shippers, but larger shippers are intentionally favored by Appellants:

*"The rail carriers directly or through dominated and controlled subsidiaries seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen * * **

The conflict of interest applies also as between larger shippers, controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses. It should be borne in mind that certain carrier-controlled warehousing facilities are not available to the general public, but only to selected concerns controlling large volumes of traffic. The tariffs provide that arrangements for storage space for westbound shipments in or on railroad piers or warehouses must be made in advance with respondents, or with outside warehouses if stored therein." (R. 105-106.) (Italics supplied.)

The Commission summarized its findings in this regard as follows:

"The present rates and practices of the rail carriers, as considered herein, cannot be justified upon the ground that the aggregate charges are not unreasonable as not all shippers are accorded the same aggregate charges for like and contemporaneous services." (R. 110.)

(b) Substantial injury to shippers results from Appellants' commercial practices.

That shippers generally who are unable to use Appellants' commercial services are injured appears from the quotations from the Commission's reports hereinbefore made.

Among the shippers most seriously injured are competing warehousemen.

The Commission found with regard to these warehousemen: .

"The private warehouse companies are 'persons' within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act * * * As shippers they are to be dealt with in accordance with the provisions of the Act." (R. 109-110.) (Italics supplied.)

"Numerous warehouse operators and associations composed of individuals engaged in various branches of warehousing appeared and were heard at both hearings in this case. The evidence adduced by such operators at the first hearing is summarized in the prior report, at page 189. Cumulative evidence, discussion of which is unnecessary, was given at the later hearing. At page 190, we said:

'Complainants offered testimony and exhibits, neither of which was refuted by respondents, which show that *they have lost business in practically every form of warehousing to the respondents' affiliated warehouse and storage companies.* They claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider trade activities and not common-carrier service.'" (R. 126.) (Italics supplied.)

"It was urged on behalf of the complaining warehousemen that the engagement of the respondents in the business of commercial warehousing would ultimately drive such warehousemen out of business, and result in a monopoly by the respondents of commercial warehousing in the Port of New York district. There appears to be a basis for their fears, * * * ." (R. 191.)

Illustrative of specific findings by the Commission are the following two quotations from its second report:

"The testimony shows, and it is almost self-evident, that commercial warehousing companies engaged in the storage of automobiles received in carload lots by rail are unable to successfully compete for that business

when faced by the competition of the storage companies subsidized by the New York Central." (R. 168.)

"The record is conclusive that through existing arrangements the respondents have provided flour storage space at less than cost. In fact, it was testified at the former hearing that, through the practice of respondents in leasing their storage facilities to trucking or stevedoring companies, it is possible for flour merchants in New York City to avoid bearing any expense for such storage. Under such circumstances it is of course clear that the operators of commercial warehouses are unable to compete successfully for the business of storing flour. Those operators are 'persons' within the meaning of that word as used in sections 2 and 3 of the act, and must be dealt with in accordance with the provisions of those sections." (R. 176-177.)

It appears from the foregoing that the Commission has found that:

1. Each of the Appellants is engaged in the warehouse and storage business in the Port of New York District and is rendering in the course of that business, warehousing and storage services to certain shippers in interstate commerce over their lines;
2. These services are rendered at less than the cost to Appellants of furnishing the same;
3. These services are made available for the purpose of inducing the movement of traffic over the Appellants' respective lines; and
4. Not all shippers over Appellants' lines receive these services, but some, including Appellants' competitors in the warehouse and storage business, are substantially injured thereby.

The Commission having made these findings of fact, the facts found are conclusively established. They are basic facts which justify the order of the Commission.

POINT II.

The order of the Commission is valid in that the rendering by Appellants of warehouse and storage services to certain shippers at less than the cost to Appellants of the services so rendered, while Appellants are engaged in the commercial warehousing and storage business, is unjustly discriminatory of and unduly prejudicial to competitors of Appellants in the commercial warehousing and storage business, in violation of sections 2 and 3 of the act, and constitutes a departure from their published transportation rates in violation of section 6.

A carrier may not, when engaged in competition with others who are shippers over its line in a commercial business wherein shipment of goods by it is involved; meet losses from its commercial business out of its transportation revenue without unjustly discriminating against and unduly prejudicing such shippers in violation of sections 2 and 3 of the Act, and without departing from its published transportation rate in violation of section 6.

This principle was definitely established by this Court in *New York, New Haven and Hartford Railroad Company v. Interstate Commerce Commission*, 200 U. S. 361 (1906).

The facts in that case were as follows:

The Chesapeake and Ohio Railroad was engaged in the business of selling coal and in the business of transportation. On December 3, 1896, it entered into a written contract with the New Haven Railroad to sell coal to the latter between July 1, 1897, and July 1, 1902, as required by the New Haven, but not in excess of 2,000,000 gross tons in all and not in excess of 400,000 gross tons in any year. (This was

a five-year transaction, not a contemporaneous purchase and sale transaction as suggested in Appellant's Brief, pages 24, 25.) The price agreed upon was \$2.75 per gross ton, New Haven basis. The coal was to be delivered by the seller on the line of the New Haven. The Chesapeake and Ohio operated a line from its coal mines to Newport News over which the coal was to be shipped. From there it was moved by boat to New Haven. At the time this contract was made the sum of \$2.75 was not sufficient to pay the cost to the Chesapeake and Ohio of the coal at the mines, the cost of movement from Newport News to New Haven and the published rate of the Chesapeake and Ohio from the mines to Newport News. Deliveries were made under the contract up to the winter of 1900-1901, when deliveries ceased due to strikes and other difficulties. The New Haven bought coal in the open market at an enhanced price and was later reimbursed by the Chesapeake and Ohio for its loss. (It should be noted that the price paid by the New Haven on the open market was paid during a period of difficulty and was not for a five year's supply. It is therefore no indication that the price paid under the contract was below the market price of the coal, as suggested by Appellants in their Brief, pages 24 and 25.) Subsequently in 1902, deliveries again ceased at a time when about 60,000 tons remained yet to be delivered. The New Haven presented the Chesapeake and Ohio with a bill for damages in the amount of \$103,000. Thereupon in 1903, a new contract was entered into whereby the Chesapeake and Ohio agreed to deliver to the New Haven 60,000 tons of coal from the Kanawha District and the New Haven agreed to discharge its claim against the Chesapeake and Ohio and to pay \$2.75 a ton for the coal so delivered. At the time this agreement was made, the contract price, leaving out of view the claim for damages, was inadequate to pay the cost to the Chesapeake and Ohio of the coal at the mines, the cost of delivery from Newport News to New Haven and the published transportation charge from the mines to Newport News.

Following an inquiry made upon complaint, the Commission brought a proceeding in the Circuit Court alleging that both contracts were discriminatory and in violation of the Act and sought an injunction against performance.

It was contended in defense that the contract of 1903 was valid because the purchase price of the coal was not merely \$2.75 a ton, but that sum plus \$103,000, the amount of the damages, the claim for which was to be discharged. It was further contended that, if any loss was suffered by the Chesapeake and Ohio, it was suffered in the coal business, as the contract price clearly was sufficient to pay the published transportation rate, and that the purchase price should first be imputed to that rate.

The Circuit Court issued an injunction and an appeal was taken to this Court.

This Court found, on the facts above stated, a violation of sections 2, 3 and 6 of the Act and continued the injunction.

In so holding, this Court said at pages 390 to 399:

"The question, therefore, to be decided is this: has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates? * * *

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by

which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: if a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported.

"And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning 'undue or unreasonable preference or advantage,' 'undue or unreasonable prejudice

or disadvantage' and 'unjust discrimination'" are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate * * *

"It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute * * *

"It is urged that if the requirements of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preference and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow

that the provisions which are expressed in that act should not be applied and be given their lawful effect.² (Italics supplied.)

Extensive quotations from the *New Haven* decision have been made to dispel any doubt which Appellants may have raised with regard to the applicability of that case to the facts in the instant case.

In the instant case, the Commission has found that the carriers are engaging in two businesses — (1) commercial warehousing and storage, and (2) transportation. In the *New Haven* case (*supra*) the Chesapeake and Ohio was engaged in two businesses, (1) selling coal and (2) transportation.

In the instant case, the Commission has found that the charges of Appellants for the warehousing and storage services rendered by them are below cost and that these costs are improperly met out of their published transportation charges. In the *New Haven* case the Chesapeake and Ohio was selling coal below cost and this Court held that these costs could not properly be met out of the published transportation charges. To meet its costs out of the published transportation charges, constituted, in the opinion of this Court, in the *New Haven* case, violations of sections 2, 3 and 6.

The discrimination found in the *New Haven* case was not, as Appellants have suggested, merely a discrimination in favor of the *New Haven*. The discrimination found was a discrimination against other shippers engaged in the coal business who were not engaged in the transportation business and who were therefore compelled to pay the full transportation charge.

In the instant case, it has been found that non-carrier warehousemen engaged in the warehousing and storage business are shippers over the lines of Appellants (R. 110) and competitors of Appellants in the commercial warehousing and storage business. (See, for example, R. 126.)

These shippers must pay the full transportation charges on goods shipped by them over Appellants' lines. They may not recoup their losses from the transportation rates.

When Appellants absorb their commercial losses in their transportation rates it follows necessarily, and the Commission has found, that they are discriminating unjustly against such warehousemen in violation of section 2, unduly prejudicing such warehousemen in violation of section 3 and indirectly departing from their (the Appellants') published transportation charges in violation of section 6. (R. 108-109; 110-111; 191-192.)

It cannot be validly urged, as Appellants appear to have contended in their brief (Appellants' Brief, pages 18 to 33), that, unless Appellants charge less than market value for their commercial warehouse and storage services, the Act cannot be violated. Not only is a criterion of reasonable worth under the circumstances meaningless, since the railroads can and do by their extensive commercial practices prevent a stable market (R. 125-126), but such a criterion has no applicability here. The discrimination which is unjust and the prejudice which is undue arise from the fact that Appellants absorb their losses in their published transportation rate, whereas their competitors in the warehouse business are unable so to do, as was the case of the competitors of the Chesapeake and Ohio in the coal business. Appellants' competitors must pay the published transportation rate undiminished.

Appellants have further contended (Appellants' Brief, pages 36 to 43) that warehouse and storage below-cost services rendered under their so-called in-transit tariffs cannot be discriminatory or prejudicial because open to all shippers alike, and cannot constitute a departure from their published rates in violation of section 6 because of the fact of publication.

These contentions will be considered further in Point III B (2) of this brief (pages 40 to 42, *infra*). It is here pointed out, in summary, that there is no merit to this contention

of Appellants. Even if these services of Appellants were technically open to all, they are of no practical value, but are, on the contrary, damaging to competing warehousemen who must pay the full transportation rates undiminished through absorption of their commercial losses. They are clearly discriminatory and prejudicial in fact, notwithstanding any provision in Appellants' tariffs.

Moreover, the warehouse and storage services rendered under Appellants' so-called storage in-transit tariffs are non-transportation services rendered in the course of Appellants' commercial warehouse and storage undertaking. (See Point IB 1, *supra*, pages 15 to 20.) As they are non-transportation services, tariff references thereto cannot create an obligation to render them. The Commission has found that they are not in fact, or even in terms, open to all. (R. 105-106.) Not being open to all, the argument of Appellants based on their openness, can have no validity. The Commission has found that these storage services have injured competing warehousemen. (See for example, R. 105.)

Furthermore, being non-transportation services, the fact that they are published does not prevent their below cost nature operating as a departure from the transportation rate. In *United States v. American Tin Plate Company*, 301 U. S. 402, 408 (1937), this Court held that publication of allowances for non-transportation services did not prevent a departure from the transportation rate in violation of Section 6 (7). The allowances had to be met from the transportation rate. This caused the departure. Similarly, in the instant case, the publication of below-cost charges for commercial warehousing and storage services does not prevent a departure from Appellants' published rate for transportation services. The losses from these non-transportation services must be met from the transportation rate. This causes the departure.

POINT III.

The order of the Commission is valid in that the rendering by Appellants of commercial warehouse and storage services to certain shippers at less than cost for the purpose of inducing the movement of traffic over Appellants' lines is unjustly discriminatory of and unduly prejudicial to all shippers who receive similar transportation services but do not receive the services so afforded in violation of sections 2 and 3 of the Act and effects a departure from their transportation rates in violation of section 6.

In Point II it has been urged that a carrier may not when engaged in a commercial business involving shipments over its line and in which shippers over its line are competitors, absorb losses from its commercial business at its transportation revenue without unjustly discriminating against and unduly prejudicing such competitors, in violation of sections 2 and 3 of the Act and without departing from its published transportation rate in violation of section 6.

Under the present heading it is contended that the practices of Appellants described above unjustly discriminate against and unduly prejudice, not merely their competitors in the commercial warehouse and storage business, but all shippers over their lines who receive similar transportation services but do not receive the non-transportation services afforded, and result in departures from their transportation rates.

A. Appellants may not render the commercial services under consideration for the purpose of inducing traffic movement over their lines.

The present case is indistinguishable in principle from that presented by *Lehigh Valley Railroad Company v. United States*, 243 U. S. 444 (1917).

It there appeared that Sheldon and Company was a forwarder of imported goods. It entered into a contract to ship, as far as possible, goods forwarded by it from abroad over the Lehigh Valley Railroad; to maintain offices in the United States and abroad; to advertise the railroad and to solicit for it. The Lehigh Valley agreed, in consideration of these services, to pay Sheldon and Company \$5,000 annually, and an allowance of a varying percentage of the published rate on goods shipped over the Lehigh Valley line. An injunction was issued restraining all payments to Sheldon and Company under the contract. On appeal this Court sustained the injunction.

The carrier contended in its appeal that the services which Sheldon and Company was rendering to it were connected with transportation and that the sum it was to be paid thereunder was reasonable and not in excess of the fair value of its services. The contention was that Sheldon and Company was paid for a service which the carrier was entitled to have rendered and, as the payment was not in excess of the value of the service, Sheldon and Company obtained no real concession.

This Court said with regard to the profitability of the arrangement to Sheldon and Company:

"Of course the expectation is that it will make a profit from the transaction, although from the uncertainty of the arrangement it *may lose*." (page 445.) (Italics supplied.)

The carrier's defense was rejected, this Court stating at page 446:

"* * * any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.

"It is true² no doubt that George W. Sheldon and Company in the performance of the services for which it is paid maintains offices here and abroad, advertises the Railroad, solicits traffic for it; does various other useful things, and, in short, we assume, benefits the road and earns its money, if it were allowable to earn money in that way."

The *Lehigh Valley* case, while the converse of the instant case, is plainly applicable. In the *Lehigh Valley* case, Sheldon and Company, a shipper, was given money by the railroad for non-transportation services with the view of inducing the movement of traffic over the road. Other shippers were not so treated. In the instant case, the Appellants render non-transportation services to some shippers but not to all at a loss and with the same view of inducing traffic. Sheldon and Company claimed that, while money was paid out by the railroad, Sheldon and Company received no more than the services rendered were worth. There was in fact no finding that Sheldon and Company had made a profit. This Court found that circumstance was not controlling. Appellants assert here that although the carriers have paid out money there is no finding that shippers have received more in value than they have paid for. The answer in the instant case, as in the *Lehigh Valley* case, must be that the fact of profit is not controlling. Traffic cannot be so bought.

The Commission, having found that the discrimination and prejudice violative of the Act arise from the below-cost performance of commercial services, properly forbade continuance of such services below cost.

Merchants Warehouse Company v. United States, 283 U. S. 501 (1937).

B. Appellants' below-cost commercial services constitute a departure from their transportation

rates and unjustly discriminate against and unduly prejudice all shippers not receiving such services.

If the published rate for transportation between points A and B is \$10 and a carrier pays \$3 out of its treasury to a certain shipper over said route in order to induce the shipper to use the carrier's line, such payment would constitute a violation of sections 2, 3 and 6 of the Act. This is the simplest illustration of a forbidden rebate.

United States v. Union Stock Yards, 226 U. S. 286 (1912).

Similarly, if a carrier pays out of its treasury \$3 for a commercial service which it renders to the shipper without charge, to induce him to use the carrier's line, the rendering of such service clearly would constitute a violation of said sections.

Central of Georgia Ry. Co. v. Blount, 238 Fed. 292 (CCA-5) (1917).

If instead of rendering such service free, a carrier, all other circumstances being the same, receives a return from the shipper of \$1 for the non-transportation service costing \$3, it is submitted that there is equally a violation of sections 2, 3 and 6. The carrier has lost \$2 as a result of its commercial service. This it must take from its line-haul rate. There is no other source. The carrier thus reduces its line-haul by \$2 and receives in effect and through indirection \$8 and not \$10 therefor. A departure from its line-haul rate, in violation of section 6, necessarily results. Moreover, transportation for the shipper receiving the less-than-cost service for \$8 instead of \$10, while other shippers who do not receive the less-than-cost commercial

service must pay the \$10 rate undiminished, constituting a violation of sections 2 and 3.

This it is submitted follows from the decision in *New York, New Haven and Hartford Railroad v. United States* (*supra*) discussed under Point II.

(1) Such violation of the Act exists irrespective of whether the below-cost services are afforded at rates below their reasonable worth.

Appellants contend, in substance, that sections 2, 3 and 6 are not violated under the circumstances set forth above; that, in effect, even though a carrier pays out of its treasury \$3 for a service given to a shipper for \$1, in order to induce that shipper to use the carrier's line, there is no unjust discrimination or undue prejudice unless it appears that the reasonable worth of what the shipper receives exceeds the sum he pays therefor (see Appellants' Brief, pgs. 18-33), and this despite the fact that, in such a situation, the carrier ultimately receives less for the transportation of the shipper's goods to the extent of its loss on the non-transportation service than it receives from other shippers for the same transportation service.

Appellants' contention is that there can be no "concession" to a shipper unless "the shipper really got something of value that he did not pay for" (Appellants' Brief, page 18), and that the Commission has not found that shippers receiving the benefit of Appellants' commercial services pay less than the reasonable worth thereof. Without inquiring into the validity of Appellants' contention as to what the Commission found in regard to reasonable worth (compare R. 105, 126, 168, 176-177, 191), it is submitted that the contention that there can be no "concession," unless the shipper obtains more in value than he has paid for, is untenable.

Such a contention is flatly refuted by the holding of this Court in *Lehigh Valley Railroad v. United States* (*supra*). There it did not appear that the shippers' contract with the

under secured a profit to the shipper or that there was an equivalence between what the shipper received and what the carrier gave. In fact this Court pointed out that the shipper might make no profit thereunder but might lose.

Moreover neither sections 2, 3 or 6, employ the term "commotion." Section 2 forbids a carrier "directly or indirectly, by any * * * device," to "charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property * * * than the charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation * * * of a like kind of traffic * * * under substantially similar circumstances and conditions." Section 3 forbids undue preference and prejudice, and section 6 (7) forbids a carrier from receiving "a greater or less or different compensation" for transportation than that specified in its tariffs. (Italics supplied.)

A carrier obtains less for transportation from the shipper for whom it renders a non-transportation service below-cost than it does from the shipper for whom it does not render such services. The performance of such services constitutes, therefore, a violation of sections 2, 3 and 6 (7), regardless of whether the shipper has received a more valuable non-transportation service than he has paid for.

As stated by the Court below:

"To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the act makes applicable alike to all shippers under like circumstances, and, if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the

evidence and has been found by the commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, *the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not.*" (R. 308.) (Italics supplied.)

Cases cited by Appellants to the effect that a carrier may not lease its surplus properties to shippers at less than the fair rental value in order to induce the movement of traffic over its lines have no bearing on the issue here involved. There was, of course, undue preference of such shippers. They obtained more than shippers not receiving the concessions, and sections 2 and 3 were violated. It does not follow that discrimination and prejudice may not arise in other ways.

The cases cited did not intimate that if fair value was received, though not cost, the carriers would not have violated sections 2, 3 or 6. No inference may be drawn, from the absence of a discussion in those cases of cost, that non-transportation services below cost were permissible. In those cases no cost problem was involved or required discussion.

Nor may any inference be drawn from the fact that cases are infrequent condemning below-cost operations. For carriers to engage in below-cost non-transportation activities on a substantial scale except when engaging, as here, in an independent commercial business is hardly to be expected as a common occurrence. The Commodities Clause, so-called (49 U. S. C., sec. 1 (8)), enacted shortly after the New Haven decision (*supra*) eliminated carriers from most commercial businesses. Infrequency of cases and discussion on the point now in issue supplementing the New Haven case is therefore to be expected.

(2) Such of Appellants' commercial services as are covered by their so-called in-transit tariffs are equally violative of the Act.

In addition to their contention that there can be no violation of sections 2, 3 or 6, unless the shippers receiving Appellants' commercial warehouse and storage services have received services more valuable than they have paid for, Appellants further contend that such of these commercial services as are rendered by them under the so-called storage in-transit tariffs cannot be violative of sections 2 or 3 of the Act because they are available to all shippers and cannot violate section 6, because the services and the charges therefor have been provided for in published tariffs.

Appellants' contention that by reason of their tariff publication the so-called storage in-transit services are available to all shippers, and therefore cannot be violative of sections 2 or 3 of the Act, is without validity.

The storage services rendered under these so-called in-transit tariffs are not transportation services. They constitute part of the commercial warehouse and storage undertaking of Appellants. (See Point I B 1 hereof *supra*, pages 15 to 20.) The fact that an agent of Appellants has written these services into the tariffs does not make them transportation services or create a duty on the part of Appellants to render them.

United States v. American Tin Plate Co. 301 U. S. 402 (1937).

Moreover, the Commission has found that not only were these services not in fact afforded to all shippers but that the tariffs in terms do not so provide. (R. 105-106; see also Point I B 4 hereof *supra*, pages 21 to 25, and see especially page 23, *supra*.)

The argument of Appellants, therefore, that since the tariffs are open to all there can be no discrimination or prejudice, necessarily falls. They are not open to all. There can be both discrimination and prejudice. The Commission has found that discrimination and prejudice exist. (See, for example, R. 108-109; 110-111; 192.)

Even were the tariffs in question in fact open to all shippers, the service, being a non-transportation service, may, not-

withstanding the fact of theoretical availability, be violative of sections 2 and 3. The shipper who does not need the service or want it is not aided by its theoretical availability. He is under no duty to use the service. If he does not, he pays for his transportation the full published transportation rate. Other shippers using the non-transportation service pay the transportation rate diminished by the loss which the non-transportation service to them has occasioned.

Nor is Appellants' argument that, by reason of tariff publication, section 6 (7) cannot be violated on firm ground.

A similar contention was made to and rejected by this Court in *United States v. American Tin Plate Company* (*supra*). The Commission had condemned allowances for certain spotting services on the ground that the services for which such allowances were made were non-transportation services. The Commission concluded that the allowances constituted a departure from the transportation rate in violation of section 6 (7) and forbade their continuance. It was contended before this Court, in opposition to the Commission's order, that inasmuch as the tariffs provided for the allowances there could be no departure in violation of section 6 (7). This Court held that as the allowances were for non-transportation service and as they must be met from transportation revenue, the transportation rate was departed from in violation of section 6 (7). The Commission's order was sustained.

In the instant case, the Commission has found that Appellants' so-called storage in-transit services are non-transportation services; that they are rendered below cost and that the loss is met out of the transportation rate. This the Commission found was violative of section 6 (7). The *American Tin Plate Company* case supports the Commission's conclusion, and its order should be sustained.

See also:

United States et al. v. Pan-American Petroleum Corp. et al., 304 U. S. 156 (1938).

POINT IV.

The order is not invalid by reason of the Fifth Amendment to the Federal Constitution.

Since the order is a valid exercise of the Commission's power to prevent the continuance of Appellants' discriminatory and prejudicial conduct in violation of sections 2 and 3 of the Act, and to prevent departures by Appellants from their published transportation rates in violation of section 6, (see Points II and III *supra*) the order is a constitutional exercise of the Federal power to regulate commerce and does not violate the Fifth Amendment of the Federal Constitution. As stated by this Court in *Los Angeles Switching Case*, 234 U.S. 294 (1914) at page 313:

"The service, however, was performed subject to the law of the land requiring that the carriers' charges should not be unreasonable or unjustly discriminatory."

and in *O'Keefe v. United States*, 240 U. S. 294, 304 (1916):

"The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by act of Congress for considerations affecting the public welfare."

Appellants have not urged the uncertainty of the term, cost, as used in the order as a ground in support of their contention of unconstitutionality. They have, however, alleged in a footnote (Appellants' Brief, page 6) that the term, cost, "is not defined with the certainty required in respect of an order for the violation of which dire penalties may be imposed."

The Commission has indicated the items included within the cost standard provided in the order. It has stated that cost includes all items which under proper accounting methods are comprehended in that term. (2. 186.)

The Commission was not laying down a rule, it was indicating a standard. A standard cannot, by its very nature, be delimited with precision. The fact that in instances of application of a standard may involve complicated determinations is not fatal to the propriety of its use.

As stated by this Court in *Nash v. United States*, 229 U. S. 373, 377 (1913) wherein the Sherman Anti-Trust Act was held constitutional:

"But apart from the common law as to restriction of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimate rightly, that is, as the jury subsequently estimates some matter of degree. If his judgment is wrong, he only may incur a fine or a short imprisonment here; he may incur the penalty of death."

See also

Waters-Pierce Oil Company v. Texas, 212 U. S. (1909), and

Small Company v. American Sugar Refining Company, 267 U. S. 233 (1925).

Not only is the standard of cost set forth in the Commission's order sufficiently certain, but mistaken application of the cost standard would not, without more, lead to imposition of penalties, as has been urged by Appellants. Penalties arise only from knowing violation of the order (Section 16 (8) of the Act.)

In *Omaechevarria v. Idaho*, 246 U. S. 343, 348 (1918) sheepmen complained of a state statute as uncertain. The contention was overruled, this Court stating:

"* * * Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, removed by Sec. 6314 of Revised Codes, which provides that, 'In every crime or public offense there must exist a union, or joint operation, of act and intent, criminal negligence.'"

and in *Hygrade Provision Company v. Sherman*, 266 U. S. 4502 (1925) this Court said:

"* * * the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing. If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite."

"* * * Moreover, as already suggested, since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such requirement."

Similarly when an order of the Federal Communications Commission was alleged to be uncertain because requiring ability to record "estimated" original costs, this Court

"If instances shall occur in which a company is unable to make an intelligent estimate with even approximate correctness, that exceptional event will justify resort to the Commission for particular instructions. In no event is there a substantial hazard of criminal prosecution. *To subject the company or its officers to prosecution for a crime the violation of the Act must have been knowing and wilful.*" (Italics supplied).

American Telephone & Telegraph Company v. United States, 299 U. S. 232, 245 (1936).

No basis exists for a claim that the Commission's order before this Court is unconstitutional.

Conclusion.

These Appellees respectfully submit that the Commission's order of February 2, 1937, is valid, and that the Final Decree of the United States District Court for the Southern District of New York sustaining said order should be affirmed.

Respectfully submitted,

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November 5, 1938.

APPENDIX.

(See page 4, ante)

The following are the portions involved in this case of sections 2, 3, 6, 15 and 16 of the Interstate Commerce Act.

Section 2. [As amended February 28, 1920, June 19, 1924, and August 9, 1935. U. S. Code, title 49, sec. 2.] That any common carrier subject to the provisions of this part shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3. [As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935. U. S. Code, title 49, section 3.] (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6. [As amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 2, 1920, and August 9, 1935.. U. S. Code, title 49, section 6.]

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers on such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the pro-

of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SECTION 15. [As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 3, 1935. U. S. Code, title 49, section 15.] (13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

SECTION 16. [As amended March 2, 1889, June 29, 1906, June 18, 1910, February 28, 1920, June 7, 1924, and August 3, 1935. U. S. Code, title 49, section 16.] (8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of \$5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, ET AL., *Appellees.*

Appeal From the District Court of the United States for the
Southern District of New York.

**BRIEF FOR THE AMERICAN WAREHOUSEMEN'S
ASSOCIATION, MERCHANDISE DIVISION,
AN APPELLEE.**

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November, 1938.

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Appeal From the District Court of the United States for the
Southern District of New York.

**BRIEF FOR THE AMERICAN WAREHOUSEMEN'S
ASSOCIATION, MERCHANDISE DIVISION.**

OPINIONS BELOW.

The opinion of the specially-constituted District Court
(R. 302), The Baltimore & Ohio Railroad Company, et al.,
Plaintiffs, v. The United States of America, Defendant, and
Interstate Commerce Commission, et al., Intervening-

Defendants, is reported in 20 F. Supp. 273, and the concurring opinion of Judge Hulburt (R. 311) in 20 F. Supp. 917. The findings of fact and conclusions of law of the Court appear in the record, beginning at page 341, and page 402, respectively.

The first report of the Interstate Commerce Commission, December 12, 1933, entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storing of Property by Carriers at Port of New York, N. Y.* (R. 29-115) is published in 198 I. C. C. 134. The second report of the Commission, on further hearing, June 8, 1936 (R. 120-199) is published in 216 I. C. C. 291. The third report of the Commission, on argument and re-consideration, February 2, 1937 (R. 269-271) is published in 220 I. C. C. 102.

JURISDICTION.

The decree of the District Court was entered March 23, 1938 (R. 406); petition for appeal was filed May 3, 1938, and was allowed on the same day (R. 411).

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C. Title 28, sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, sec. 345).

QUESTIONS PRESENTED.

Whether the findings of the Interstate Commerce Commission, taken at their full and face value, are sufficient in law to support the order of February 2, 1937 (R. 272-274).

Whether the services of storage, handling and insurance, found by the Interstate Commerce Commission to be commercial services with respect to goods voluntarily warehoused by appellants in facilities enjoying storage-in-transit privileges, are transportation services, since tariffs covering such voluntary services are permitted or required to be published and filed with the Commission.

STATUTES INVOLVED.

Pertinent provisions of the Interstate Commerce Act, as amended, and the Elkins Act, are printed in the Appendix, *infra*, pages 62-68, incl.

STATEMENT.

This is an appeal from a final decree (R. 406) of the specially-constituted District Court dismissing appellants' bill to enjoin and set aside the Commission's order of February 2, 1937 (R. 272-274) insofar as the order requires that the respondent carriers*, appellants here, cease and desist:

(a) From permitting shippers in interstate commerce over said carriers' lines to occupy space by lease or otherwise in the warehouses and other storage facilities owned or controlled by the carriers, at rates and charges below the cost of providing the space;

(b) From storing goods shipped over their lines in interstate commerce, or providing space to shippers in interstate commerce over their lines for commercial storage of goods, as fully described and defined in said reports, at rates and charges which fail to compensate these carriers for the cost of storing such goods or providing such storage space;

(c) From directly or indirectly handling goods incident to such commercial storage as defined and described in said reports, at their warehouses and storage facilities, for shippers in interstate commerce, at rates and charges which fail to compensate them for the cost of such handling;

* The Baltimore & Ohio Railroad Company
The Central Railroad Company of New Jersey
The Delaware, Lackawanna & Western Railroad Company
Erie Railroad Company
Lehigh Valley Railroad Company
The New York Central Railroad Company
The Pennsylvania Railroad Company

(d) From insuring goods shipped over their lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York district for shippers in interstate commerce at less than the cost of providing such insurance. (This requirement of the order is directed against all the respondent carriers except The Central Railroad Company of New Jersey which as the Commission found, does not engage in such insurance);

(e) From applying, by means of tariffs now on file with the Commission, rates and charges which fail to compensate the carriers, fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce, which goods are stored, handled or insured in connection with commercial warehousing services as fully defined and described in said reports. (R. 342, 343)

The order further required that appellant, the Central Railroad Company of New Jersey, shall cease and desist from subsidizing and granting concessions to the Newark Central Warehouse Company by means of non-compensatory rentals for space leased from said appellant by the Newark Central Warehouse Company. (R. 343.)

As issued, the order also required appellant Erie Railroad Company to cease and desist from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of excessive rentals paid for space leased from that company. Upon complaint of the latter that it had not been granted a hearing, the Commission, by order dated April 9, 1937, rescinded this part of the order and reopened this part of the case for further hearing. Therefore the question of the validity of this part of the order is not before the Court. (R. 343)

The appellants, named in the above footnote, are trunk line railroads serving the Port of New York District. The American Warehousemen's Association, Merchandise Di-

vision, is an appellee; it respectfully presents this brief and submits that the decree below should be affirmed.

The American Warehousemen's Association, Merchandise Division, is an unincorporated national association, composed of about (400) four hundred merchandise warehousemen (many of whom each own or operate several variously located warehouses). This national association has, for over 47 years, functioned as the national business or trade organization for the said public warehousing industry. Organized to promote the industry's welfare, it has participated in and adduced evidence before the Commission in the hearings in this case. Association members own or operate over ten million square feet of public merchandise warehousing space in the Port of New York District.

Many association members have been seriously affected by the conduct of appellants subjecting these members (through violations of the statutes as found by the Commission) to unjust discriminations and undue prejudices, and to the most ruinous of below-cost, wasteful competition in their (appellants') purchase of traffic activities. These traffic-grabbing vices, in the competition between appellants, include the wild grabbing, one from the other, regardless of the "market" or the "cost," of the commercial warehousing accounts of certain (larger) shippers. These large shipper accounts—heavy traffic—are obtained by appellants even if thereby depletion of line-haul tariff charges results. (R. 105-107; 111-113; 196-198; 348-350, 355, 356; 367, 368-369; 382.)

Proceedings Before the Commission.

The order made by the Commission was the result of an investigation upon the Commission's own motion regarding the practices of rail carriers which affect operating revenues or expenses. It was purposed to correct unlawful discriminations, prejudices, and other violations of law found by the Commission. This investigation was known as Ex

Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses; for the convenience of the Commission this investigation was divided into several parts. Part VI of this proceeding was instituted by the Commission January 6, 1932, on its own motion, and concerned the practices of railroads in warehousing and storing property in the Port of New York district. These practices were initially brought to the Commission's attention by complaints of warehouse operators in the New York district.

These warehouse operators complained that carrier-owned or controlled warehousing facilities were being operated in a manner which precluded the complaining warehouses from obtaining much, if any, of the business; thereby they were losing much of their business to carrier-controlled facilities and that they could not longer meet the competition of such warehouses. (R. 31, 344, 349-50)

Each of the appellants herein was named as a party-respondent in said proceeding. Pursuant to notice given, there was a hearing in said proceeding, held at New York, N. Y., during the period June 27 to July 13, 1932, at which evidence was presented by counsel for the Commission, and by counsel for the complaining warehousemen. In order that the respondents might have ample time to prepare their defense, thereupon the proceeding was adjourned and pursuant to notice given, the hearing was resumed at Washington, D. C., about six weeks later, August 22, 1932, at which time the respondents presented evidence. At these hearings voluminous evidence was taken; the transcript of the testimony covered approximately 2,343 typewritten pages, and 234 documentary exhibits were received. (R. 344)

A proposed report was issued by the Commission's Examiners March 13, 1933, served upon the parties, and to this proposed report exceptions were filed by the respondents and by certain other parties. Oral argument before the Commission was waived. The Commission issued its first report in said proceeding on December 12, 1933, (*supra*)

7
containing its findings of fact, conclusions and decision, wherein it admonished all carriers, subject to the Interstate Commerce Act, including appellants herein, "that their practices and charges should be adjusted in conformity with the principles announced in this report." (R. 113) The Commission made no order at that time. (R. 345)

The carriers (appellants) failed to correct the violations of the law as pointed out in the findings made in said first report, and the Commission on May 6, 1935, ordered the proceedings re-opened for further hearing. After notice further hearings were held in said proceeding at New York during the period from June 24th to July 6th, 1935, and 1,629 additional pages of testimony were taken, together with 68 additional documentary exhibits. Thereafter further briefs were filed in said proceeding, but oral argument was again waived. The Commission issued its second report on further hearing in said proceeding on June 8, 1936 (*supra*), containing its findings of fact, conclusions and decisions based upon the enlarged record then before it. With said report the Commission issued an order of the same date, but subsequently suspended this order from time to time, and it was superseded by the Commission's order of February 2, 1937. (R. 345)

After the issuance of this second report, and the order of June 8, 1936, the carriers petitioned the Commission to grant them a third hearing, which petitions were denied. However, the Commission re-opened the proceeding for oral argument and re-consideration. Oral argument was held before the Commission on November 23, 1936. Thereafter, on February 2, 1937, the Commission issued its third report on argument and re-consideration (*supra*) and with this report made the aforesaid order of February 2, 1937. (R. 345)

The Commission's Findings.

The Commission (and the Court below) made full and complete findings concerning which no single finding was set forth, alone, as basic or as the ground for its conclusions or order. It first pointed out that the commercial warehouse business has been an important factor in the conduct of this country's commerce for more than a hundred years, and that it has been necessary, always, for tradesmen dealing in quantities of merchandise either to provide and operate their own warehouse facilities, or to use those provided by public warehousemen for the storage and distribution of their goods. (R. 34, 346) The principal business solicited and performed by public warehousemen is the handling, storing, (for long or short terms) and the distribution of freight (including all incidental services), in carload or small quantities, regardless of the form of transportation used in shipment or reshipment. This commercial warehousing business includes as one of its functions the assembling and distribution of carload lots, permitting tradesmen to take advantage of lower rates in carloads than in less-than-carload lots. (R. 34, 346, 347) Commercial warehousing includes performance of storage, handling, and related services at public warehouse facilities where storage-in-transit privileges are enjoyed. (R. 356)

Respecting this commercial warehousing business, regarding assembling and distributing carload lots, the Commission found that the carriers, appellants, were parties to and were bound by the provisions of the Consolidated Freight Classification, by the various rules of which the trunk lines provide that they will neither load, unload, assemble, or distribute carloads of goods which they transport at carload rates. (R. 34, 347) By Rule 27 of the Consolidated Freight Classification, carload freight, transported at carload rates, must be loaded and unloaded by the owner or consignee (*Ibid*). These rules in connection with the provisions of the Uniform Bill of Lading the Demurrage Tariff and the Jones Storage Tariff,

provide for simple and orderly terminal service on shipments of freight for which the storage service afforded is short, and for which such storage service is a necessary step in the tendering of out-bound shipments for transportation, and the delivery of inbound shipments (*Ibid*).*

The distinction between transportation storage, or storage in connection with transportation service which the carriers are obligated to furnish, and public warehousing or commercial storage and warehousing is distinctly drawn by the Commission in both its first and second reports: "While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal." (R. 103) The Commission found clearly a distinction between voluntary or commercial storage ordinarily performed by a warehouse, and the involuntary storage which carriers subject to the act are obligated to perform. The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function. (R. 188, 189, 348, 368).

The Commission found that the complaining private warehousemen who claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practices of the carriers (appellants) in en-

*The bill of lading demurrage provisions concern carlot shipments into and out of New York where the shipper does not promptly load or unload the cars placed for loading or unloading. A certain time, without additional charge for the car use, is allowed and included in the tariff rate. Thereafter a penalty, or demurrage charges, accrue. The Jones tariff provisions concern involuntary storage (penalty charges) on shipments tendered for transportation but necessarily stored on the carrier's premises because of delay re transportation instructions; or, relate to shipments received in New York (inbound) concerning which the consignee does not take delivery within the free time allowed in the transportation tariff.

gaging in what the warehousemen (appellees here) consider trade activities and not common-carrier service, introduced testimony and exhibits in the Commission proceedings, none of which was refuted by the carriers, which show that these commercial warehousemen have lost business in practically every form of warehousing to the appellants' affiliated and storage companies. In addition to furnishing warehousing services the Commission found that the appellants, or their subsidiaries, also rent space in stations, piers or warehouse buildings to certain shippers for various purposes, and the rental exacted, "is not only below the prevailing rates but is non-compensatory." (R. 97, 98, 107, 126, 349, 350) "Obviously no independent warehouse could continue to sub-lease space or store goods at charges below cost." (R. 138) The warehousing, storage, handling, etc., rates offered by appellants are below those of private warehousemen. (R. 105, 107) The Commission recognized no obligation of the rail carriers to place their charges for commercial warehousing on any basis to insure profit to private commercial warehousemen, but only the obligation that the carriers' charges meet the provisions of the statutes. (R. 110)

Private or commercial warehousing companies are "persons" within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the transportation charges which these "persons" are required to pay and the treatment they are accorded by the carriers subject to the Act, are subject to the provisions of these sections as well as to the provisions of the Elkins Act. As shippers these private warehouse companies are to be dealt with in accordance with the provisions of the Act. (R. 109, 110, 127) These warehousemen (appellees), both merchandise and cold storage, are engaged in the storage and warehousing of goods shipped in interstate commerce to and from all sections of the United States over appellants' lines, and their business is dependent for existence upon the appellants' transportation services—coupled with reasonable and non-discriminatory rates and practices. (R. 97, 346)

It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which private warehousemen, appellees, cannot meet. (R. 97, 348)

The *motive of the appellants* in engaging in the commercial warehousing business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines. The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. The aggregate of the charges for transportation and warehousing, or storage, influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services. Those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit. The rail carriers directly, or through dominated and controlled subsidiaries, seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen. (R. 105, 124, 125, 348, 349)

It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation. The Commission pointed out that in the variety of arrangements of the carriers, appellants here, the result was always the same, namely, possession and control of warehouse facilities available to serve whatever competitive purposes railroad management may have in mind. (R. 124, 125, 348, 349) In seeking out the larger shippers and offering them non-compensatory rates and charges for warehousing services or space furnished, (rates below those of private warehousemen (R. 105)) the Commission found that the record showed the conflict was not confined to rail carriers and private warehousemen, but that the struggle between different rail carriers for supremacy in the matter of in-

documents was clearly evident, without due regard for expenditures and profitableness of the business. (R. 106)

Furthermore, the conflict of interest applies also as between larger shippers controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at non-compensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses. (R. 106, 183, 349)

With reference to these practices and charges, the performance of commercial warehousing services, at non-compensatory rates, the Commission found that these practices and charges result in heavy losses not only to the appellants here, but also to the competitive commercial warehouse companies. (R. 125)

The Commission found that while up to the close of the year 1930, the cold-storage industry had placed approximately 33,689,000 cubic feet of refrigerated space on the market in the New York district, that within three years thereafter, warehouses affiliated with the Erie and Pennsylvania Railroads placed an additional 8,500,000 cubic feet of refrigerated space on the market, an increase of about 25 per cent over the amount of such space put on the market by all public warehouses in that district during the preceding period of fifty years, or more. It found also that at the time these new facilities were opened for operation there was an unused occupancy of at least 30 per cent of the then existing facilities, and that at the time of the further hearing (June, 1935) there was less than 50 per cent occupancy. (R. 125, 350)

At the time of the second hearing (June, 1935) at least 43 private warehouse companies engaged in merchandise warehousing (other than cold storage) in the Port of New York district had placed 20,450,000 square feet of warehouse space on that market, during a period of seventy years up to that time, and that within six years after Janu-

ary 1, 1929, the appellants or their affiliates added 6,185,000 square feet of new merchandise warehouse space on this market, and that thereby *without commercial need* appellants increased the available capacity at least 25 per cent. (R. 125, 126, 350). The Commission specifically pointed out and found that: "The record indicates that because of insufficient prospective earnings, it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds." (R. 126).

Following these findings applicable, generally, to all appellants, the Commission separated its findings and analyses, and:

(a) Discussed the properties used or leased for warehousing purposes by each individual appellant;

(b) Considered the storage of eastbound carload freight at New York;

(c) Dealt with storage in transit arrangements and the warehousing of westbound carload freight at New York;

(d) Made findings concerning the insurance practices of appellants, and

(e) Summarized the general westbound storage situation and made principal findings of fact with respect to the so-called "transit storage," and services incidental thereto. (a, R. 128-175; b, R. 176-179; c, R. 179-192; d, R. 192-196; e, R. 179-192; 196-198.)

Regarding (a), the facilities used or leased for commercial warehousing purposes by each individual appellant, the Commission found:

1. The Baltimore & Ohio owns a warehouse building in New York City at 26th Street and 11th Avenue, constructed in 1913, in which space is leased to its subsidiary, the

Baltimore & Ohio Stores, Inc., which conducts a general warehouse business of the same nature as, and in competition with private merchandise warehousemen in the Port of New York district. (R. 128, 352) Most of the commodities stored in this warehouse are shipped over the Baltimore & Ohio in interstate commerce; in some instance the storage company pays the freight charges on shipments consigned in its care and arriving collect, later collecting them from the consignee. In other cases, money advances are made to shippers for payment of charges for trucking or similar incidental services for which a commission is charged. Labeling, sorting and marking of commodities are performed at a charge; some pool cars are handled. The practices at this warehouse did not differ materially from the practices of warehouse operators in general in the Port of New York district for a number of years after the incorporation of the predecessor of the Stores Company in 1914. As then conducted it apparently resulted in some profit. However, upon the entrance of other appellants into the commercial warehousing field in the district, on a much larger scale than those of the Stores Company, competition for commercial warehousing business became increasingly bitter. (R. 129)

After that time the Traffic Department of the B. & O. dominated the management of the Stores Company. (R. 129) The desire of the Traffic Department to secure business for the Baltimore & Ohio resulted in forcing the warehouse rates and charges to unprofitable levels, leaving the Baltimore & Ohio to assume the burden of the warehousing operation. (R. 130, 134) The Baltimore & Ohio's Traffic Department dictated many rates which, when applied by the Stores Company, resulted in the rental of space and storage of goods at prices which, while they obtained the line-haul business for the Baltimore & Ohio, were less than the cost of providing the space or services. The shipper, in those instances, obtained a concession in storage which affected and reduced the total cost for transportation and storage of the commodities shipped.

(R. 134, 135). The Commission found that by bearing the losses of the Stores company the concession was provided, resulting in unjust discrimination and violation of section 2, and undue and unreasonable preference and advantage in violation of section 3, of the Interstate Commerce Act, and that the carrier departed from its published transportation tariff rates, in violation of section 6 of the Act. (R. 135, 136)

Prior to July 10, 1930, the B. & O. used space on its piers 5 and 6, St. George, Staten Island, and a portion of Municipal Pier 12, Stapleton, Staten Island, rented from the city, for such storage. On that date the B. & O. leased and thereafter used space in the American Dock Stores at Tompkinsville, Staten Island, at a rate of \$.55 per square foot per annum for this storage—this to enable the B. & O. to maintain its position among the other lines and to “obtain satisfactory results from a solicitation and traffic producing standpoint.” On August 5, 1930, the B. & O. leased space in Pouch Terminals, Inc., at Clifton, Staten Island, for a similar purpose and at the same rental; both leases are flexible so far as space is concerned. In this space were stored goods (west-bound) under the “transit privilege.” (R. 42, 47, 48, 49, 50, 128, 355). The in-transit arrangements and storage of westbound carload freight are later discussed—((c) and (e)).

2. The Lackawanna leases an indefinite amount of space in the upper floors of its warehouse building in Jersey City, an eight-story warehouse building containing over a million square feet of floor space, built by this carrier on its tracks near the water-front in Jersey City, completed in April, 1930, to its wholly owned and controlled subsidiary. The space leased varies with the needs of the subsidiary company. Its subsidiary, the Lackawanna Terminal Warehouses, Inc., conducts a commercial warehousing business in this space similar to that conducted by private warehousemen in the Port of New York district, and in competition with them. (R. 70, 71, 136, 351) The Traffic Depart-

ment of the Lackawanna has at all times dominated the warehousing arrangements of that appellant. The Commission pointed out the willingness of the various appellants to grant concessions in leasing of space to shippers in interstate commerce who control a large volume of traffic—that it is well illustrated by the leasing of space by the Lackawanna through its affiliated warehouse company to the Kraft-Phenix Cheese Corporation. (R. 140) The principal findings of fact by the Commission respecting this carrier are set forth at pages 144, 145 and 146 of the record, among which the Commission found that the non-compensatory rates and charges, and the other practices described re the Lackawanna in relation to this commercial storage of freight, reduce below the published tariff rates the transportation charges paid by said shippers, and grants other unlawful concessions to said shippers. The Commission further found that by assuming a part of such costs, by granting such concessions, the Lackawanna is guilty of unjust discrimination in violation of section 2 of the Act, makes and gives undue and unreasonable preferences and advantages in violation of section 3 of said Act, and departs from its published tariff rates in violation of section 6 of said Act. (R. 146) The warehousing of westbound freight by this carrier, under the storage-in-transit privilege is hereinafter discussed under (c) and (e).

3. The Lehigh Valley does not itself operate a warehouse business at its facilities. In 1929 it constructed its Lehigh Bronx Terminal Warehouse, a 12-story building on the Harlem River, New York City, containing 370,000 square feet, and in 1930, the Lehigh Valley Railroad completed its Sterrett-Lehigh building on 27th Street, 11th to 13th Avenues, New York City, containing 1,813,000 square feet. This appellant rents space in its facilities to various tenants. The Commission found the evidence to show that this appellant directs its efforts to leasing space to tenants who will produce freight traffic to its lines; that numerous prospective

tenants were refused space because their business would not produce rail traffic warranting such allocation (R. 58); that the Vice President of the Lehigh Valley had informed its General Land and Tax Agent, re leasing space, that for the time being he did not desire any leases in the Bronx warehouse property from a purely real estate viewpoint (R. 58, 149). Many other pertinent findings concerning these properties being leased below cost are included in the record including failure to collect rentals from persons who used the Lehigh Valley in transporting their shipments—that this failure results in the same situation as the failure to exact compensatory rentals. (R. 152) A summary of the principal findings of fact is found at pages 153 and 154 of the record; they are similar to those of the other carriers mentioned hereinbefore. West-bound storage, under in-transit arrangements, is later discussed.

4. The Central Railroad of New Jersey owns a six story steel and concrete warehouse located at Lawrence and Mechanic Streets in Newark, New Jersey. Until June, 1954, this warehouse, constructed in 1906, was operated by a subsidiary of the railroad; at that time the building was leased to the Newark Central Warehouse Company and in it that company now engages in general merchandise warehousing business in competition with other merchandise warehousemen in the Port of New York district. (R. 52, 53, 154, 155, 352) Traffic solicitation and advertising for the warehouse company emanate from the Freight Traffic Department of the Jersey Central in connection with the railroad's traffic information. (R. 155) Under the lease arrangement to the Newark Central Warehouse Company, the amount of rental paid by said company during its first year of occupancy was \$17,217, or slightly less than one-half of the taxes on the building for that period (R. 157) During that time, also, there was expended upon the building through the Jersey Central subsidiary company, \$38,560 in repairs, and depreciation on the building amounted to approximately \$21,500. (R. 157) The Commission found that the subsidi-

ary Newark Warehouse Company was responsive to the direction and control of the Central Railroad of New Jersey, a part of that carrier, and that it necessarily followed that that appellant provides warehousing facilities for the Newark Central Warehouse Company at rentals which are wholly non-compensatory. (R. 157, 159) Through the leasing "arrangement" a subsidy is given for commercial warehouse services, and unlawful "concessions" result, due to the traffic considerations involved. (R. 158) These findings were followed by findings of unjust discrimination, undue preference and advantage, sections 2 and 3 violations of the Interstate Commerce Act, and a departure from the published tariff rates in violation of section 6 of the Act. (R. 160) There is later discussed the west-bound so-called "in-transit" storage of this appellant.

5. With reference to the Erie Railroad, the Commission found that one of the earliest and most active carriers in the development of the present warehousing situation in the Port of New York district was this appellant. Sponsored by the Erie, or under contract by the Erie, the warehouse of the Seaboard Terminal and Refrigeration Company was constructed containing 800,000 square feet of space of which, under agreement, the first four floors, or 320,000 square feet, which are not refrigerated, are leased by the Erie from the Seaboard Company. (R. 88, 162, 163, 350, 351) In this (and other) warehousing space, the rental for which is 85c per square foot per annum, the so-called "in-transit" storage of west-bound freight is effected. The matter of the relation of the Seaboard Company and the Erie Railroad respecting space rentals by the Erie from the Seaboard is not included in this proceeding. (R. 343, paragraph #5) As in the case of the other appellants the so-called "in-transit" west-bound commercial storage activities of the appellant are hereinafter discussed.

6. The New York Central, in 1930, constructed its Kingsbridge Warehouse at 230th Street and Kingsbridge Avenue,

in the Bronx, in New York City, a six-story building, containing 300,000 square feet of space; and in 1934, this appellant constructed its St. John's Park Terminal Building in lower Manhattan on Spring Street, between King and Charlton Streets, a three-story building containing 600,000 square feet. The Auto Storage Company leases the space of the Kingsbridge Warehouse, except one-half of the first floor, which is used as a local freight station. This Auto Storage Company receives automobiles in carload lots; these are stored and later delivered in single units, or delivered direct without storage. The Carrier's arrangements with the Auto Storage Company provide for certain services including the unloading, delivery and certain free storage services. (R. 78, 79, 167, 168) The J. A. Mellish Warehouse Company, Incorporated, is closely affiliated with the Auto Storage Company. (R. 81) The New York Central leased the Mellish Company a warehouse building known as the Old Sheep House, and the first and second floors of a building known as the Rossiter Stores at an annual rental of 6.25 cents per square foot per annum, which is from 1/8 to 1/10 of the usual rate of paying for warehouse space in New York City. (R. 81, 167). The Mellish Company lease was revised January 1, 1935; however, the Commission found that under such leasing arrangement it is apparent that the rental paid is indefinite and affords opportunity for the collection of non-compensatory rentals such as have been condemned in other cases. It found the arrangements constituted a device to purchase traffic. (R. 168) The New York Central arrangements with the Auto Storage and Mellish Companies, whereby those companies perform services re unloading of automobiles, have been continued—in the amount of \$1.50 per automobile, or about \$5.25 per freight car. The Commission pointed out that certain of the appellants load and unload carload traffic, or make allowances to cover the cost of such loading and unloading for certain shippers, under exceptions to the classification, contrary to the general practice re carload traffic and to the

Consolidated Freight Classification provisions. (R. 168) It stated that an illustration of this character is the allowance made by the New York Central to the Auto Storage and Mellish Companies for unloading automobiles, including removal of materials used in stowing the automobiles in the cars. The Commission noted that this record is conclusive that the space rentals furnished by this appellant to the Auto Storage and Mellish Companies are at less than cost of providing such space, and that it is likewise conclusive that the services for which the allowances are made, are commercial, not common carrier services. A summary of these principal findings of fact by the Commission re the New York Central are found on pages 169 and 170 of the record. (R. 168, 169, 351, 352) The west-bound so-called "in-transit storage" of freight by this appellant is herein-after described.

7. The Pennsylvania Railroad completed it's Harborside Warehouse, located in the water-front in Jersey City, early in 1930; this structure contained 2,100,000 square feet of space, of which 1,750,000 square feet, are devoted to general merchandise warehousing, and 350,000 square feet are refrigerated or cold storage space; all three units are operated by the Harborside Warehouse, an owned and controlled subsidiary of the Pennsylvania Railroad Company. The Commission found that while it does not appear that this respondent has indulged in price-cutting on storage or space rented to the same extent as the other appellants here, it is clear that under some circumstances it engages in practices such as alterations made in space rented to fit the needs of some particular shipper, such as free rental for a period of time at the beginning of the lease, or such as the non-collection of storage charges when due, which offer opportunities to defeat the requirements of the Interstate Commerce Act. The Commission found a variance in the extent of the services performed by the Pennsylvania for its shipper-tenants, and as a result the compensation received by that appellant for a given service likewise varies;

such arrangements are contrary to the principles of the Act. The Commission's summary of these findings of fact concerning this appellant appears on page 175 of the record. (R. 174 and 175) The other findings concerning this appellant, relating to so-called "in-transit storage" arrangements of west-bound goods, and other practices, are hereinafter related.

In addition to the warehousing activities above noted under (a) each of the seven appellants directly and in its own name, in the capacity of commercial warehousemen, in competition with and solicitation against the private commercial warehousemen in the Port of New York district, is voluntarily engaged in the warehousing, storage and handling of goods, stored under the storage-in-transit privilege. (R. 47-50, 52, 53, 56, 63, 70, 75, 76, 77, 93; 179-192; 352) These goods generally are for west-bound rail shipment, discussed herein under (c) and (e) (*infra*, pp. 22, 30).

Regarding (b), the storage of east-bound carload freight at New York the Commission found, in its first report, (R. 36-39), that no extra charge is made by the carriers for handling goods in-and-out of storage, such as is described hereinafter in connection with west-bound freight. (R. 37) Storage of flour is a commercial necessity, and this commodity is desirable traffic from the appellants' standpoint. (R. 176) Dealers and persons interested in this commodity have been and are able to secure concessions for storage, which reduce and in some cases nullify their cost for the storage necessary, and appellants have willingly or unwillingly assumed the burden of the storage expense. (*ibid*)

This had been brought about through leasing of space in the railroad-owned or controlled warehouses, which permits lessees who are dealers in flour, or are otherwise interested in its distribution, to avoid payment of appellants' published charges for storage in their premises. (R. 51, 52, 176) Leases for space for storage of east-bound carload freight

at New York provide low monthly rentals on a square foot basis. In many instances the lessees are parties having no interest in the commodity itself, but only in the trucking, lightering, storing or stevedoring thereof. The record is conclusive that through existing arrangements the appellants have provided flour storage space at less than cost. (R. 176, 177) It is possible, as testified to at the first hearing, for flour merchants in New York City to avoid bearing any expense for such storage. (R. 177) Among other detailed findings of the Commission (R. 176-179), it stated that the leasing of space to shippers for storage of the particular description of traffic herein involved results in such shippers paying a lower storage rate than that charged other shippers for a space identical in all respects, and constitutes a device whereby respondents engage in unjustly discriminatory and unduly preferential practices forbidden by sections 2 and 3 of the Act. (R. 179)

The Commission pointed out that the leased space so discussed is leased from appellants and used for storage which is a necessity and which is a component part of the commercial activities in connection with the handling and distribution of flour; this storage is not a part of transportation as defined in the Act. (R. 179) The Commission further found that appellants by paying for or assuming the cost of such commercial service depart from their published transportation rates and charges in violation of section 6 of the Act. (R. 179, 369, 370, 371, 372, 373)

Regarding (c), the storage in transit arrangement and the commercial storage of west-bound carload freight at New York, the findings of the Commission were comprehensive and detailed:

Large tonnages of various commodities are warehoused and stored by appellants under the west-bound storage-in-transit privileges. (R. 182-187, 354) In 1933, for example,

the aggregate tonnage stored by appellants were 152,746 tons of rubber, 33,570 tons of wood pulp, 37,635 tons of coffee, cyanide, sugar, ivory nuts, tin, senna, pepper, tapioca, flour, soap, ground peat, cocoa beans, hemp, paraffin wax, paint, bran and burlap, and 28,279 tons of various other commodities, or a total of one-quarter of a million tons, over 504 million pounds. (R. 180, 181, 354).

The storage in-transit privilege and rules and regulations governing the same are published in separate tariffs of appellants, filed with the Commission. These tariffs permit removal of goods stored under the in-transit privilege, at any time in any quantity, and by trucks (with certain charges) or other means. If held in storage beyond time limits of the transit privilege specified in tariffs, the same rates for storage apply. (R. 38) Both storage and handling charges are involved regarding this heavy west-bound traffic, and the Commission noted that the rates for storage and handling of west-bound freight are substantially lower than the rates for storage of east-bound freight. Some of the west-bound freight is stored on railroad piers which are also used for the storage and handling of east-bound freight. The Commission pointed out that the reason for the different storage rates has not been explained by appellants and that the difference cannot be justified by difference in service or service costs. (R. 39)

Under the storage in transit privilege if a shipment is re-forwarded from a transit point within the transit period, the rate in effect on the date of the shipment from the point of origin in the New York Harbor to final destination will apply, with certain exceptions. (R. 38, 105, 181, 353) "For example, crude rubber in car lots, moved by the B. & O. from ship-side in New York harbor to a warehouse in the port district for storage, is charged an in-bound local rate of 14 cents for 100 lbs. If subsequently reshipped over the B. & O. to Akron, Ohio (a typical destination) a rate of 40 cents per 100 lbs. is collected, and, since that rate is ap-

applicable from the shipside as well as from the warehouse, the local in-bound rate of 14 cents is refunded, resulting in the application of a net through rate of 40 cents. If the out-bound shipment is made after the expiration of the designated time limit, or is forwarded over the line of a carrier other than the in-bound rail carrier, the in-bound and out-bound movements are treated as local shipments and the separate rates to and from the warehouse are applied, resulting, in the case of the crude rubber to Akron, Ohio, in rates of 14 cents to the warehouse and 40 cents from the warehouse, or a total of 54 cents." (R. 353, 38)

These tariff provisions relating to the storage in transit privilege govern the application of the carriers' transportation rates; *they have no relation to the rates and charges for the warehousing or storage service which, as conducted by appellants in the Port of New York district is commercial and not transportation storage.* The Commission pointed out that this (so-called "in-transit storage") "partakes of the nature of commercial storage, and the storage involved is not, properly speaking, in-transit storage. The fact that it is designated as such in the carriers' tariffs does not invest it with the characteristics of in-transit storage." (R. 105) (Emphasis supplied.) In its second report the Commission confirmed its previous findings and stated further "that, to the extent that the respondents [appellants] engage in the storage of those commodities under the practices heretofore discussed, those respondents [appellants] have departed from the business of transportation and entered the business of commercial warehousing." (R. 191, 353, 354)

Concerning the voluntary warehousing of west-bound freight, stored in appellants' facilities enjoying storage-in-transit privileges, certain of the particular findings for each appellant showed?

1. The Lehigh Valley Railroad uses space in its Claremont terminal for this commercial and so-called in-transit storage. On July 1, 1935, it had in storage there, under its

west-bound storage in transit privileges more than 6,000 tons of crude rubber, cocoa beans and various other commodities. (R. 146, 354) The Commission found that on crude rubber remaining in store on the Lehigh Valley Railroad property for a period of twenty months, in accordance with an exhibit of record, the handling cost, and the storage cost, which does not take into account any depreciation on the building, *exceeded the entire amount of revenue which the Lehigh Valley receives as its divisions for transporting crude rubber from ship-side to the end of its line at Buffalo, New York.* (R. 146, 361) The Lehigh Valley pays 43.3 cents per net ton for handling west-bound freight; the published handling charge is 20 cents per ton on this west-bound freight. (R. 61)

2. The Lackawanna's subsidiary warehouse company performs all handling of goods stored by it and in its name at its Jersey City warehouse, including loading and unloading of cars, trucking to and from various locations in the warehouse, piling, transferring and loading into trucks and reloading. (R. 73, 358) After June 1, 1931, by contract the carrier pays 58 cents per ton for each handling. Two are necessary. It costs the carrier \$1.16 per ton to place the goods in storage and to reload them into a car. The shipper, under the so-called "in-transit" tariff, is charged 20 cents per ton for handling, thereby netting the Lackawanna a loss of 96 cents per ton. (R. 73, 359) At this carrier's Hoboken and Jersey City piers its handling of west-bound freight so stored under the in-transit privilege costs 35.9 cents per ton at the covered piers, and at other piers 12.7 cents per ton. Here again, at the covered piers, a loss of 15.9 cents per ton is absorbed. (R. 76, 359) In addition, the Commission found that this carrier, acting through its subsidiary, warehouse company, "performs services indirectly which it may not perform directly, and thus departs from the provisions of its tariff." (R. 144)

3. The Erie performs such storage (west-bound) under the in-transit privilege in space (the first four floors) leased

by it in the building of the Seaboard Terminal and Refrigeration Company in Jersey City, and in the warehouse of the Long Dock Company, a wholly-owned subsidiary, located on the water-front in Jersey City; also on its Weehawken and Jersey City piers 8 and 9. (R. 91-96, 161, 162, 354) As of March 1, 1935, this appellant had in storage in its leased Seaboard space approximately 17 million pounds of crude rubber; and in its Long Dock space 10 million pounds of the same commodity. (R. 161, 163, 354) In Commission's first report is shown a loss on similar freight in the Long Dock space for the year 1931 averaging \$2.76 per ton (R. 161), without considering a return on the value of the land on which the building is located. At the time of the second hearing, the Erie conceded that the charges for similar storage were then no more compensatory than at the time of the first hearing. (R. 363, 363) The loss suffered by the Erie on freight so stored in its space leased from the "Seaboard" aggregated \$6.18 per ton. (R. 163) See p. 18, *supra*.

4. The Baltimore and Ohio Railroad, for its west-bound storage under the in transit privilege, utilized space in the facilities of the Pouch Terminal and American Dock Stores, Staten Island, for which it paid 55 cents per square foot per annum. (R. 47) In the Commission's second report the rate is noted as 45 cents per square foot per annum. (R. 128) This carrier did not construct and place on the market new facilities. The General Manager of the Baltimore & Ohio, re minimum expense on rubber stored in leased space at Pouch Stores, computed the "net expense" as \$4.23 per ton. He added \$3.46 for labor in and out, \$2.00 per ton for lightering or trucking, and \$0.207 for agent or clerk, totaling terminal and storage expense of \$8.897 per ton, to be absorbed by the carrier before rail movement began. (R. 48) The then rate on rubber to Akron, Ohio, was \$9.40 per ton and the Baltimore & Ohio proportion was \$8.36 per ton. The rate from New York to Akron has since been reduced to \$8.00 per ton. (R. 49) In its second report the Commis-

sion set forth the total expense per ton on rubber west-bound, Baltimore & Ohio, at \$7.06 per ton, with a resulting loss of \$4.53 per ton, on rubber stored for one year. The transit privilege for rubber extends for 30 months. It stated that such loss is absorbed by the Baltimore and Ohio out of its line haul revenues. (R. 128, 362)

5. The Pennsylvania Railroad performs its west-bound storage under the in-transit privilege using space in its Greenville pier at Jersey City, a covered single-deck pier, 210 feet wide and over 1000 feet long, and on its two-story piers K and L at Jersey City. (R. 63, 355) The Commission pointed out it was unable to separate or apportion the investment or overhead on these piers, and that this was *due to the commingling of lightering and storage* freight in the same location. It found that all handling of freight at the Greenville and other piers of this carrier was done by contract labor, at a rate of 44.45 cents per ton for each handling, August 10, 1931, which was reduced to 40 cents per ton for each handling on March 1, 1932. This was double the Pennsylvania's published handling charge on crude rubber and wood pulp. (R. 64, 359)

6. The New York Central, for this west-bound storage under the in transit privilege, uses space in its Rossiter Stores, a six-story warehouse building on 59th Street, near the Hudson River, New York City, and on its Weehawken and other piers. In its first report the Commission found that the New York Central paid 2 cents per hundred pounds to the Linde Company stores for the first thirty days storage, plus 1 cent per hundred pounds for each additional fifteen days, plus 4 cents per hundred pounds for handling in and out of storage; that the carrier collects 1.5 cents per hundred pounds for the first thirty days storage, .5 cents for each succeeding 15 days, or fraction thereof, and 1 cent for handling in and out of storage. (R. 82) In its second report the Commission pointed out that in some respects the New York Central indicated a disposition to follow the first

report, but that progress was not made to any extent in that direction, due to the lack of cooperation on the part of certain other appellants. (R. 167)

7. The Central Railroad Company of New Jersey uses space in its Jersey piers 5, 11 and 14 for the storage of west-bound "in-transit" freight. These are single-deck covered piers of steel and concrete constructions. The Commission set forth in detail the costs of operations and the revenues from storing and handling charges in its first report. (R. 55) It specifically found the average handling costs at these piers, whether from car to dock or from dock to car, is 42.8 cents per ton, and for necessary double handling 85.6 cents per ton. The shipper who so may arrange for such services is charged 20 cents per ton, handling. (R. 55, 359) The Commission pointed out that manifestly the carrier must bear the deficit in its operation. (R. 55)

The *summarized findings regarding the west-bound storage of freight under the in-transit privilege for all appellants*, jointly, are discussed under paragraph (c).

While the above findings of the Commission concerned storage and handling of west-bound freight under the in-transit privilege, the Commission particularly and separately dealt with the storage of west-bound carload freight at New York in its second report, beginning at the bottom of page 179 of this record, and then summarized the principal findings of fact regarding the so-called "storage in-transit" and services incidental thereto. (R. 196) Since the summarized findings relate also to insurance practices of appellants, they are dealt with hereinafter in paragraph (e) following the Commission's findings concerning insurance practices of appellants.

Regarding (d), the insurance practices of appellants, the Commission, for each of them, found:

1. The Baltimore & Ohio, prior to September 6, 1930, maintained an insurance rate of \$1.73 per year per

\$100 of value to cover west-bound freight, stored under in-transit privilege on its piers at Staten Island. Some warehouses of competing lines enjoyed more favorable terms. The B. & O. adopted the so-called eight cent rate, effective September 6, 1930. It protects its liability by insurance. (R. 50) During 1931 this carrier collected \$793.52 from shippers for insurance on this west-bound "transit" freight and paid out to insurance companies during the same year \$2,861.07. (R. 51) In its space leased from American Dock and Pouch Terminal this carrier loses up to 7 cents per \$100 of value on insurance.

2. The Central Railroad Company of New Jersey, contrary to the practice of the other appellants does not publish an insurance rate of 8 cents per \$100 of value on freight stored under in-transit arrangements at its terminals. At piers 11 and 14, its insurance rate is \$1.29 per \$100 of value. It has refused to lower this rate to conform with the change made by other appellants. (R. 55, 56).

3. The Lehigh Valley charges the 8 cent rate. It does not re-insure. To date it has had no losses. As of June 1, 1935, this carrier had in storage commodities valued at over one million dollars. (R. 62, 195, 365)

4. The Pennsylvania found, on numerous occasions, that because of its high insurance rate, it was unable to compete with other appellants for west-bound "storage in-transit" freight. (R. 66) While this carrier doubted the legality of an arrangement for a uniform 8-cent rate it reluctantly became a party thereto with other appellants to meet their competition. (R. 66) The Commission found that on a typical carload of rubber, moving from New York to Akron, (40,000-pound car) value of 17 cents per pound, or a total of \$6,800 per car, the amount that the Pennsylvania absorbs per car, at pier C, is \$124.10; at pier K, \$13.39; at pier L, \$92.00; at its Greenville pier, \$108.80. (R. 67) The Pennsylvania, as set forth in the second report of the Commission, takes care of the insurance in its own insurance department (R. 195) and thereby absorbs about 7 cents per \$100 of value per annum. (R. 195, 365).

5. The Delaware & Lackawanna Railroad applies the 8 cents per \$100 of value as the insurance rate applicable to freight stored under in-transit privilege, westbound movement. It covers its liability by re-insuring at a rate of 35 cents per \$100 of value per annum and absorbs the difference. (R. 76) However, that finding refers to insurance on storage at piers. Like the Erie Railroad this appellant's most important storage facility is a modern warehouse where the insurance rate is 6 cents per \$100 of value per annum. (R. 195)

6. The New York Central has made no change in its insurance practices since the first report of the Commission was issued. It does not re-insure the property stored. In June, 1931, it paid a claim of \$5,382.00 for damage by fire on 10,000 bags of stored sugar. At the time of the second hearing, the amount of its insurance covered by the 8-cent rate was \$87,877.00. (R. 195, 365)

7. The Erie Railroad has important storage facilities on which the insurance rates are 6 cents per \$100 of value per annum. The Commission also found that the record indicates that on other facilities where goods insured by the Erie are stored, the insurance rate is considerably above 8 cents per \$100 of value per annum, but is not clear as to whether or not the Erie re-insures the freight with insurance companies. (R. 194)

With reference to (c), the summarized or principal findings of fact regarding the practices of all appellants, relating to voluntary warehousing of west-bound freight, stored in facilities where the storage-in-transit privileges are applicable; the Commission pointed out, before making this summary, that the storage rates were revised and increased on certain commodities, but that this did not, however, apply to crude rubber and wood pulp, which commodities amount to approximately 75 per cent of the west-bound

freight stored at the Port of New York. (R. 180, 354, 357) The Commission clearly pointed out that *no pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory* and stated that in most cases it is not contended on this record that the rates and charges on goods stored under the in-transit privilege compensate the carriers for the cost of storage and handling. (R. 182, 361, 362, 363) The Commission considered the claim of appellants respecting their fears of loss of business to other ports and other forms of transportation, finding that certain shippers successfully resist the imposition of higher storage rates on their commodities, while many others are compelled to pay increased charges on their commodities, and then stated that the record is not convincing that it would be advantageous to shippers to divert a substantial amount of rubber or other traffic to other ports or to other forms of transportation if the storage rates on such traffic should be increased. (R. 183, 184)

At page 186 of this record the Commission summarized the cost data from an exhibit of record, finding the average cost to all appellants for storing coffee and other named commodities (not including rubber or wood pulp) was 71 cents per ton per month, and the handling cost was 44 cents, making a total cost of storing for one month and one handling of \$1.15; if such goods remain in storage longer than one month the carrier's cost for the second month is 71 cents while the shipper pays only 60 cents; the longer the storage period the greater the loss. (R. 187, 374)

On rubber the average cost per month for storage was 50.46 cents per ton, and for each handling 44 cents per ton. The carrier's charge is 30 cents per ton for the first month and 10 cents per ton for each succeeding 15 days, or fraction thereof. When rubber is stored for one 30-day period, and two handlings necessary, the average cost to appellants totals \$1.3846 per ton. The tariff charged (1933) was 70 cents per ton for the storage and handling, netting a loss of 68.46 cents for each ton so stored and handled. For each

successive thirty day period there was a storage loss alone of 30.46 cents per ton. (R. 187) Similarly, the losses on wood pulp were found by the Commission. (R. 187)

The Commission pointed out, at pages 187 and 188 of the record, that extra handlings are frequent and that in certain cases the goods must be handled a third time, finding that the cost of the two extra handlings is borne by the carrier and not by the shipper, although it is to the shipper's commercial interest to avail himself of the storage facilities. (R. 188) *The Commission specifically noted that this commercial warehousing service performed in relation to the westbound freight, is a convenience for the commercial interest of the owner of the goods, proven by the fact that the transit period has been extended from time to time for the convenience of the shipper.* (R. 189)

The Commission explicitly stated, at the top of page 190 of this record, "We are not to be understood as condemning bona fide transit arrangements, but only the practices here considered by which the carriers, through stress of competition, have assumed by tariff publication a part of the costs of strictly commercial storage and handling of goods." (R. 367) It went on to say, in the next paragraph, on page 190, "The fact that the carriers' tariffs designate the storage as in-transit storage was considered in the prior report, but we found that such designation did not invest this storage with the characteristic of storage in transit. Tariffs are but forms of words, and in administering the act we can look beyond the forms to what causes them, and what they are intended to cause and do cause."

Following this finding, the Commission affirmed its previous findings (R. 191) and stated, explicitly, "It is established beyond doubt that *each of the respondent carriers [appellants] in attempting to stimulate traffic for its line, under the guise of storage-in-transit tariffs, provides commercial storage and handling to certain persons for less than the cost of those services. The respondents [appellants] thus reduce the transportation rates to such per-*

sons to the extent of the difference between the sale prices of the storage and handling and the cost thereof." (R. 191) (Emphasis supplied.)

Thereafter, the Commission made the following summary of principal findings of fact with respect to this so-called "in-transit storage," and services incidental thereto, including insurance and handling. (R. 196, 197; 367, 368, 369):

"1. Each of the seven Class I respondent carriers considered herein provides by tariff publication for storage, handling, and with the exception of the Jersey Central for insurance, of carload freight in warehouses, buildings, or piers owned or controlled by it or by companies with which it is affiliated.

"2. The storage, handling and insurance arrangements provided under respondents' tariffs, considered in the discussion herein in connection with the storage of east-bound and west-bound carload freight and insurance, are not services incidental to transportation, but are commercial services. Similar commercial services are performed by competing warehouse companies in the Port of New York district, which are not owned or controlled by, or affiliated with, respondents.

"3. The tariffs providing said services are a part of a scheme devised to purchase competitive traffic, and through said tariffs the respondents hold themselves out to perform or furnish commercial services under the guise of transportation services.

"4. The said tariffs are instruments which work violation of the act * * *

"5. The respondents deal in and furnish commercial storage, handling, and insurance of goods at rates and charges which do not re-imburse them for the full cost of providing such services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods in their owned, controlled, or affiliated warehouse buildings or piers.

"6. The respondents do not assume or bear any part of the cost of conducting the commercial operations of competing shippers who store goods in warehouses operated by said competing warehouse companies."

Upon these findings and upon other facts, as found in its reports, the Commission found and concluded, in respect of the so-called "in-transit storage," and services incidental thereto, as follows:

"We find that, exclusive of storage and handling directly incident to immediate transportation or immediate delivery of goods, the storage, handling, and insurance of goods under tariff arrangements in warehouses or piers owned or controlled by, or affiliated with, respondent carriers, as described of record and discussed herein, are commercial services provided to certain shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost thereof.

"We further find that the provision by respondents of said commercial storage, handling, and insurance at such non-compensatory rates and charges reduces below the published tariff rates the transportation charges paid by certain shippers in interstate commerce, whose goods are so stored, handled and insured, and results in concessions to said shippers to the extent of the difference between the cost to said respondents of providing such storage, handling and insurance, and the amount which they receive therefor.

"We further find that through such storage, handling, and insurance arrangements, and by granting such concessions, the respondent carriers are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said act, and depart from their published tariffs in violation of section 6 of said act.

"We are not to be understood as here condemning bona fide stoppage and storage in transit as permitted generally by carriers throughout the country, for the purpose of milling, manufacturing, or similarly trade processing the commodities stopped or stored.

"We affirm our prior findings that the respondents' warehousing and storage practices, charges assessed therefore, allowances made in connection therewith, and the insurance of goods as hereinbefore described in the Port of New York district, dissipate respondents'

funds and revenues, are not in conformity with efficient and economical management, as contemplated by the Interstate Commerce Act, and are not in the public interest." (R. 196-198)

In its third and last report, the Commission affirmed its findings of fact and conclusions of law as shown in its two prior reports, excepting, however, that after reviewing its administrative practices of many years the Commission acceded to the request of appellants that the commercial rates and charges in connection with the westbound traffic commercially stored under in-transit privileges, in appellants' facilities, should be published in tariffs filed with the Commission. (R. 271) In this connection, however, the Commission explicitly stated:

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act."

SUMMARY OF ARGUMENT.

A. Appellants' purposes, in performing commercial warehousing services for certain shippers, or leasing space to them without regard to cost and the prohibitions of the act, are to purchase traffic. This results in line haul rate rebates which the Commission may enjoin.

B. The performance of commercial warehousing services, voluntary storage and related services, are not within appellants' common-carrier duties.

C. Nothing in the Commission's order deprives appellants of their property.

D. Appellants assume their major premises in adducing that the Commission's findings are insufficient in law, and that the services performed are transportation services.

ARGUMENT.

A—Appellants' purposes, in performing commercial warehousing services for certain shippers, or leasing space to them without regard to cost and the prohibitions of the act, are to purchase traffic. This results in line haul rate rebates which the Commission may enjoin.

The purposes of the appellants in performing these commercial warehousing services or leasing storage facilities are clearly to prefer certain shippers, to discriminate against the private warehousemen, also shippers, and thus to "grab traffic" and compete with one another. As is later more fully brought out, effectuation of these purposes disregards the placing in the hands of certain shippers opportunity to compete and ship at great advantage over others. These purposes wilfully and designedly do not take into account the prohibitions of the Interstate Commerce Act.

The findings of the Commission as to appellants' motives in engaging in commercial warehousing, or leasing such

facilities, were that appellants sought to induce shippers to use their rail facilities in their competitive struggle with one another. (R. 124, 125, 348, 349) These appellants expect to recoup their losses through rail transportation revenues and it appears of little concern to them that these commercial services are furnished at less than cost—their activities are designed to grab traffic—particularly from one another. First, one or another began it and then the vicious circle was entered. (Ibid)

These appellants sought out the larger, or principal, shippers; it was their traffic which was sought; it was they who were offered *lower rates for warehousing services and space than those of the private warehousemen*. (R. 105) These were non-compensatory rates and charges, as the important west-bound traffic situation clearly discloses. (R. 106, 183, 349) And the Commission, at the same time, found that these inducements were made without due regard for expenditures and profitableness of the business. Neither prevailing market nor even cost mattered. (R. 105-107; 124-126; 348-350)

The complaining private warehousemen claim that a large part of the value of their facilities has been confiscated and destroyed by these appellants' traffic grabbing practices—engaging in these commercial warehousing activities at less than cost—and the Commission found that *the testimony and exhibits introduced by these private warehousemen, which showed that they have lost business in practically every form of warehousing to appellants' affiliated and storage companies stand absolutely unrefuted*. (R. 97, 98, 126, 349, 350)

Independent warehouses cannot continue in business and at the same time lease space or store goods at charges below cost. From the record the Commission stated this was obvious. (R. 138) And as to space rental activity, another way of providing storage facilities in this instance, here again the testimony and exhibits of the commercial warehousemen stand unrefuted, *as further evidenced by the*

finding of the Commission that these appellants, directly or indirectly, rent space in piers or warehouse buildings to certain shippers, and the rental exacted is not only below the prevailing rates, but is non-compensatory. (R. 107) While these appellants have sought and recouped their losses in commercial warehousing operations from their line haul revenues, in accordance with their motive and purpose to grab traffic, those private warehousemen who are engaged solely in the warehousing business, the Commission finds, must depend entirely upon that business for revenue and profit. (R. 124, 125; 348, 349)

The motive of the carriers, therefore, blinds them to the dissipation of their funds and revenues, to efficient and economical management and is in disregard of the public interest. (R. 198, 369) Private warehousemen, however, store, handle and ship goods over appellants' lines and are dependent for their very existence upon appellants' transportation services in their business, such service coupled with reasonable and non-discriminatory rates and practices. (R. 97, 346)

These appellants erected or acquired enormous amounts of warehousing facilities, when, as the Commission found, more than ample such commercial warehousing facilities were already available. (R. 125, 126, 350) One of the Commission's findings was that the record before it indicated that because of insufficient prospective earnings it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds. (R. 126) While most of the appellants constructed expensive new warehousing facilities, one of them, the B. & O., engaged in this glorious gamble for traffic by renting existing facilities on Staten Island.*

* Referring to the fact that the Baltimore & Ohio did not construct such commercial warehousing facilities as did its competitors, the General Freight Traffic Manager of the B. & O. testified, inter alia: "In October, 1929, the Baltimore & Ohio found its crude rubber business falling off, both actually and relatively. This it

The principle does not vary, be the facilities leased, purchased or constructed by the appellants who devote them to commercial warehousing uses or so lease them to shippers to grab traffic.

Having shown that the Commission so clearly has found the motive and purpose of appellants in engaging in these commercial warehousing services, or storage space rentals, that they do so by offering the larger shippers lower rates for warehousing services and space than those of private warehousemen, and without due regard for expenditures and profitability of the business, offer these services and facilities at non-compensatory rates and charges, *we shall use the B. & O. as an illustration to show just how these described activities result in line haul rates rebates.* Important as the storage space rentals and other condemned activities of appellants are, they are *relatively* of much lesser importance than the serious far-reaching west-bound storage activities.

The American Dock Terminal and Pouch Stores at Staten Island enjoy the storage in-transit privilege. (R. 355, 356) The B. & O. leases some of the space in these facilities to enable it to maintain its position among the other

believed to be due to the lower insurance rates in the facilities of its competitors and to the superiority of those facilities themselves; and it cast about for ways and means to improve its competitive position. It could have done as some of its competitors had done, i.e., construct a new pier with modern warehouse facilities, but it did not seem to be the part of wisdom to do this." (T. T. 2774) He went on, however, after mentioning the excess of facilities available, to point out that: "We could not, however, sit idly by and see our competitors take the cream of our traffic away from us, and we were forced to adopt some expedient to meet this situation. . . . The American Dock and the Pouch Terminals, located on the waterfront, and on the tracks of . . . a Baltimore & Ohio affiliate, with warehouse facilities fairly comparable with the facilities of our competitors, seemed to afford the logical solution to our difficulties. In these facilities space could be leased in quantities as desired. The elasticity of the arrangement appealed greatly— . . . that we are never paying carrying charges on unoccupied space . . . " (T. T. 2774, 2775)

appellants and to obtain satisfactory results from a solicitation and traffic producing standpoint. It leases and enlarges the amount of leased space as it needs it, (buys its use). (R. 355) Some light is shed upon this finding of the Court and the Commission, by the B. & O. testimony in the footnote, *supra*. By performing the commercial warehousing services, handling, storage and insurance below cost in these leased facilities, in 1931, the B. & O. found the result was a net loss averaging \$2.48 per ton at American Dock, and \$2.26 per ton at Pouch Stores on the goods so stored. (R. 361, 362) At present the total loss to the B. & O. in connection with the traffic handled in these facilities, stored for one year, and handled out, amounts to \$4.53 per ton, and this loss is absorbed out of this appellant's rates for the line haul transportation of the rubber stored, such line haul rate being, to a typical destination, \$8.00 per ton. (R. 362) On each ton of freight insured at these leased facilities at the 8 cent per \$100.00 of value rate, the B. & O. absorbs or pays about 7 cents more. (R. 51, 194, 365)

This concession from the line haul rate is clearly a rebate and is prohibited under the provisions of the Interstate Commerce Act. In *Wight v. U. S.*, 167 U. S. 512, 17 S. C. R. 822, this Honorable Court, speaking through Mr. Justice Brewer, stated, referring to section 2 of the Interstate Commerce Act, (page 823):

"The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another."

In *New York, New Haven & Hartford Railroad Company v. I. C. C.*, 200 U. S. 361, 26 S. C. R. 272, this Honorable Court, through Mr. Justice White, in connection with the sale of coal transported (and here we have the sale of a commercial service) where the total money received from the commercial transaction and the transportation of the

commodity was less than the cost and the published tariff charges, held as follows:

"Now, in view of the positive command of the 2nd section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." (P. 277)

In this New Haven coal case, as this Honorable Court pointed out,

" . . . the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates." (P. 279)

The Commission's findings in the instant case show an identical disregard, show little concern on the part of appellants that the commercial warehousing services were furnished at less than cost. (R. 105, 107; 124, 125; 348, 349) This Honorable Court (in the New Haven coal case) went on to say:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of ocean carriage, etc., the gross sum realized

was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates." (P. 279)

This Honorable Court concluded, therefore, that:

" . . . the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce" (P. 281)

That these concessions by appellants, as illustrated in this B. & O. example are prohibited under the provisions of the Interstate Commerce Act, is further borne out by the decision of this Honorable Court in *United States, et al. v. American Sheet & Tin Plate Co., et al.*, 301 U. S. 402, 57 S. C. R. 804, in which case Mr. Justice Roberts delivered the opinion of the Court. The findings in that case showed that the "spotting service" was not a transportation service which the carriers were obligated to perform in respect of receipt and delivery of freight (P. 807); this service, suiting the commercial needs of shippers and consignees, was a spotting service beyond transportation obligation of the carriers. It occurred at the beginning or end of transportation, while in the B. & O. illustration here before us the service found by the Commission to be commercial warehousing, which the carriers are not obligated to perform, occurs shortly after the first step in the transportation of the commodity from ship-side to interior destination. In this *American Sheet & Tin Plate case*, the allowance or concession was published; in the B. & O. example, and re all westbound so-called "transit freight," it is published; and in the instant case the Interstate Commerce Commission condemned:

" . . . the fact that the respondents [appellants] have voluntarily engaged in storage and warehousing services which are not within their common-carrier

obligations, and by providing such services to shippers below the cost of such services, reduced the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act." (R. 271)

In the *American Sheet & Tin Plate case*, in respect to such commercial services this Honorable Court stated:

"The Interstate Commerce Commission is authorized and required to enforce the provisions of the act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, 'or otherwise in violation of any of the provisions of this act (chapter),' to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist." (P. 807)

This Honorable Court went on to say:

"Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it." (Pp. 807, 808)

In the instant case the allowance or concession, or rebate, is that from which the Commission, in the proper exercise of its power, has ordered the appellants to cease, desist and abstain.

The means by which appellants' purposes are being accomplished, resulting in concessions or rebates which the

Commission has power to enjoin, (as this B. & O. illustration, *supra*, shows), are the performing of commercial services at non-compensatory charges, charges below cost. Cost in and of itself is a definite term; clearly it may be made certain; it is clearly determinable and that which is definitely determinable is certainly definite. This term has been used by the Commission many times in the past, and by this Honorable Court, as for example, by the Interstate Commerce Commission *In Re Refrigeration Charges on Fruits, etc., from the South*, 151 I. C. C. 649, 654; and this Honorable Court in *Nor. Pac. Ry. v. North Dakota*, 236 U. S. 585, 596, 604. Both the Commission and the specially-constituted District Court found a formula for determining costs* was used by warehousemen to arrive at rates. (R.

* The formula for determining warehouse costs and thereby a basis for warehousing rates was the subject of testimony and evidence in both the first and second hearings of the Commission; detailed testimony, unrefuted, also appears in the second proceeding of the Commission in the examination of Witness Wilson V. Little, beginning at page 3896 of the Transcript of Testimony. Exhibit A-64, placed in evidence by Witness Little, sets forth the warehousing trade method for determining reasonable costs under the National Recovery Administration approval, and at page 3901 of the Transcript of Testimony, Witness Little distinguishes " * * * between the cost accounting methods recommended by the merchandise division of the Association for the industry, and the cost accounting methods approved by * * * " the N. R. A. He testified that "The difference between the two, fundamentally, is that the purpose of the cost set-up in our Encyclopedia is to establish compensatory rates, whereas the cost method that was approved by the National Recovery Administration was solely for the purpose of establishing cost per se, and the National Recovery Administration in okaying its method did not allow as a cost factor anything that looked in the way of being income on capital; so the cost method that was approved by the N. R. A. for our industry contained no factor for interest on investment." This witness testified that the American Warehousemen's Association, Merchandise Division (T.T. 3900) began to formulate a cost accounting procedure in 1918, published the recognized cost method for the trade in 1923, and, as just quoted, the industry's cost accounting method was that approved by the N. R. A. By reference to the exhibit A-64 for an understanding of the industry's cost accounting method, it is obvi-

41, 187, 374) It is the performance of these commercial services below cost, resulting in line-haul tariff rate concessions, allowances or rebates, which the Commission finds results in the violations of the Act. And it is this means that the Commission's order enjoins. All the Commission does is to require that these appellants, in respect of their violation of the prohibitions of the act,

“ . . . cease employing the means by which it had been accomplished”. *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 514; 51 S. C. R. 505.

In this *Merchants Warehouse case* the carriers had contracts with warehousemen to perform certain services for which the carriers paid a stipulated compensation, and one carrier made such provision for this allowance in its published tariff. The Commission and the Court below made findings that these warehouses were confined to warehousing of merchandise for patrons, and the services performed by these warehousemen under their contracts with the railroads for which they received the allowances were in fact performed for the owners of the merchandise rather than for the railroads. In this *Merchants Warehouse case*, as in the instant case, the shippers using public warehouse fa-

ous that for rate-making purposes the rent in the *plant expense*, or other operating costs set forth on page 6 of that exhibit, if the facility is owned, *should be based on such present values as to give a fair rental amount as of today, no matter what be the original cost of the building.* This is clear from pages 6 and 9 of Exhibit A-64, and from Witness Little's full testimony. This was covered in more detail in the Commission's first hearing by two witnesses. (H. E. S. Wilson, T. T. 1011-1088; C. B. Carruth, T. T. 1626-1675; 1729-1754.) These references to the Transcript of Testimony are made because it is believed they shed considerable light upon the findings of the Commission and the Court respecting the Commission's use of the term "cost" in re commercial warehousing operations. Exhibit A-64 sets forth, further, that when the square foot cost of occupied space (on a two-thirds occupancy basis, which is the "average occupied space" over an annual period) has been ascertained, available actuarial tables may be applied to determine storage charges necessary to return the actual cost of "storage". (P. 10 of Ex. A-64)

cilities were found to select generally the company offering the lowest aggregate charge for the distribution of their goods, and, by reason of the allowances made, or rebates, the "contract warehouses" were able to quote lower prices than their competitors and thus secure business which otherwise would go to the latter. For in the instant case, the appellants offer and provide lower rates for the commercial warehousing services and for space rentals than the private warehousemen. (B. 105, 107) This the B. & O. example clearly shows.

In the *Merchants Warehouse case*, and here, the real purpose was to obtain the freight shipments over the lines of the competing carriers. In the *Merchants Warehouse case* this Honorable Court pointed out, through Mr. Justice Stone, in regard to the service rendered by the warehousemen for which the allowance was made, that the service rendered was one which

" * * * if performed by it would nullify its published rates for carloads transportation service".—citing the *New Haven case*, supra. (P. 508)

This Honorable Court stated:

"Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation. *Union Pacific R. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 220; 32 S. Ct. 39; 56 L. Ed. 171. Appellants rely on *Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42; 32 S. Ct. 22; 56 L. Ed. 83, but it is distinguishable from both the present and the Updike case in that it did not involve discrimination among shippers or consignees, which was condemned in the latter." (P. 509)

What has been heretofore argued regarding engaging in the commercial warehousing business, preferring certain shippers, grabbing traffic, undercutting commercial public

warehousemen, performing the commercial services below cost, and regardless of what it costs, with resultant concessions from the line-haul tariff rates assessed on the goods so stored and transported, likewise applies to space rentals of warehousing facilities to shippers. What matters it, in principle, if the B. & O. pays 45 cents or 55 cents per square foot per annum for needed warehouse space and then, on a commodity storage charge basis, in order to purchase or grab traffic, sells its services therein performed as a commercial warehouseman at less than cost for storage, handling, and insurance, thereby reducing (rebating) its line-haul charges as tariffed for its transportation, or, whether it re-lease this same space to a shipper for storage or for a warehouse to aid it to prefer customers-shippers, (or for a warehouse-shipper), and thus obtain his (its) traffic, and re-leasing does so at 25 cents per square foot per annum, or 10 cents? The principle is the same, obviously.

Taking, for example, the situation of the Newark Warehouse of the Central Railroad of New Jersey, wherein the Commission found that the present operations of the Newark Central Warehouse Company in commercial warehousing, through the present leasing arrangement, are in substance and fact subsidized by appellant carrier. (R. 158) This subsidized concern,* the Commission cites the testimony to show, under its "arrangement" competes with private warehousemen by offering storage rates and handling charges averaging "48.47 and 63.74 per cent, respectively, below the storage and handling charges * * * " otherwise available in competing facilities. (R. 158) Here again it is found that traffic considerations are the motive and cause. The Commission, re the adjunct of the Jersey Central's traffic department, among other facts found that

* The first year rent paid was slightly less than one-half of the taxes on the building for that period. The rent that year was \$17,217. Repairs and depreciation amounted to over \$60,000 that year also. (R. 157)

through this leasing arrangement, described of record, the carrier directly bears part of the lessee company's commercial warehousing expense** and that so doing violates sections 2, 3 and 6 of the Interstate Commerce Act because of the resulting "concessions"—rebates. (R. 159, 160) The difference between cost and the present below cost lease basis is the "concession", herein termed rebate (*ibid*). The B. & O. example and argument fully applies. (See also: *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849; *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292, and here the traffic motive and tariff concessions are present.)

In the *Merchants Warehouse case*, *supra*, at page 509, this Honorable Court stated:

"Such allowances are forbidden, even though paid to appellants and their competitors alike, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by sections 2 and 3 of the Interstate Commerce Act": Citing: *Lehigh Valley R. R. v. U. S.*, 243 U. S. 444, 446; *U. S. v. Union Stock Yard*, 226 U. S. 286.

B—The performance of commercial warehousing services, voluntary storage and related services, are not within appellants' common carrier duties.

The business of a railroad is transportation, not storage. *In Re Demurrage Investigation*, 19 I. C. C. 496. The term "transportation" as used in section 1(3) of the Interstate Commerce Act, while it includes the word "storage", does not include *commercial warehousing services*. As the Commission set forth in its findings in this case,

"Storage of property transported is a transportation service only to the extent that the storage is nec-

**That company is a "person" under section 2. (R. 158) Some light is shed on this finding in the testimony of the carrier's comptroller re the below normal rental or storage charges position of the lessee to clients of the warehouse. The comptroller stated: "From the viewpoint of contracts, the gates are wide-open". (T. T. 3368)

essarily incidental to transporting such property, and the term is used in section 1 in that limited sense". (R. 189)

The Commission performed its obligation and its duty in this case by determining, as the act requires of it,—when transportation, as defined in the act, begins and ends, and by determining whether or not the condemned acts or services incident to the conveyance of goods from one point to another are or are not a part of transportation which common carriers subject to the act are obligated to perform. It discussed the transit arrangements or transit privilege in detail (R. 189) and clearly concluded in each of its reports that the practices which its order seeks to enjoin are commercial, not transportation, services or duties. It distinguished voluntary and involuntary storage, and, as set forth by this Honorable Court in *Cleveland & St. Louis R. Co. v. Dettlebach*, 239 U. S. 588, and in *Southern Ry. Co. v. Prescott*, 240 U. S. 632, placed involuntary storage within the carriers' obligation and duties, something not within their election to perform, but a service obligatory under the bill of lading contract.

In the case here before you, no one can require that the storage services (or space rentals) be furnished by appellants; no part of the carriers' transportation obligation is unfulfilled by not engaging in these commercial activities. In the *Dettlebach* and *Prescott* cases, *supra*, however, goods had been transported to destination; parties entitled to receive them failed to remove them within the free time, and the goods were left, *involuntarily*, so far as the carriers were concerned, in their possession. Under such circumstances the necessary storage service clearly was involuntarily performed and was a service in the performance of which penalty storage charges were applicable. We may note, also, that in these two cases there was involved no discrimination against shippers or other persons, nor was there involved any depletion of line-haul revenues, as in the instant case.

The fact that any tariffs of any nature had been filed with the Commission covering these commercial and non-transportation services does not preclude the Commission from enjoining a carrier to cease employing the means by which it accomplishes discriminations. For

"Where a forbidden discrimination is made, the mere fact . . . that the machinery for making it is in tariff form, cannot clothe it with immunity". *Merchants Warehouse Co. v. U. S.*, *supra*, p. 509; citing *Louisville & Nashville R. R. Co. v. I. C. C.*, 282 U. S. 740.

Your Honorable Court decided the question relating to the authority of the Commission to determine what is and what is not a transportation service in very clear language in the *American Sheet & Tin Plate case*, *supra*, at page 807, wherein it is stated:

"The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service." Citing *Los Angeles Switching Case*, 234 U. S. 294, 311; *Merchants Warehouse Co. v. U. S.*, *supra*.

It can not, therefore, be argued that these commercial warehousing services are transportation services, or that thereby the *primary questions*,—the erasing of the unjust discriminations, undue prejudice and undue preferences; estopping the violations of section 6 of the act; abstaining from the granting of concessions from the line-haul rates; ceasing the condemned practices deemed contrary to public policy and which dissipate appellants' funds and revenues contrary to efficient and economical management as contemplated by the Interstate Commerce Act;—that thereby these primary questions can be hid behind any kind of a tariff for any of these condemned practices. No condemned tariff can be used by which to turn these commercial services into transportation services—to transfer these commercial transactions into transportation duties of appellants.

C—Nothing in the Commission's order deprives appellants of their property.

While there is nothing in this order of the Commission which deprives appellants of their property in contravention of the Fifth Amendment of the Constitution, it is respectfully submitted that the complaining warehousemen who have placed unrefuted testimony and exhibits before the Commission (R. 97, 98, 126, 349, 350), have consistently set forth that a large part of the value of their warehouse properties has been confiscated and destroyed by the condemned-as-unlawful practices of appellants here who are engaging in commercial warehousing operations and charging rates not only below what the competing warehousemen offer (R. 105), this to induce the traffic to their rails in their vicious competition one with the other (R. 124, 125, 348, 349), but also at non-compensatory rates and charges which reduce the cost to certain shippers for the transportation of their goods. (R. 271)

The law is well settled with regard to the finality of an order of this Commission. In *I. C. C. v. Union Pac. Ry. Co.*, 222 U. S. 541; 32 S. Ct. 108, 111, this Honorable Court clearly set forth that the orders of the Interstate Commerce Commission were final unless they were:

“ . . . (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.”

Citing:

I. C. C. v. Illinois Central R. R., 215 U. S. 470,
Southern P. Co. v. I. C. C., 219 U. S. 433,
I. C. C. v. Northern P. R. R. Co., 216 U. S. 544,
I. C. C. v. Alabama Midland R. Co., 168 U. S. 146.

Assuredly a requirement that cost be obtained for services or space is not confiscatory. There is no question whatsoever presented by appellants with respect to the sufficiency of the evidence, nor is there any unreasonableness in the exercise of the Commission's authority. Each of the above requirements set out by your Honorable Court has been met in this case. Contrary to any injury accruing to the appellants, they still seek license to continue to violate civil and criminal provisions of regulating statutes, and to impair and destroy the business and value of the properties of the complaining warehouse companies. These concessions, allowances, rebates if you please, of appellants who are wilfully disregarding and violating the act, assuredly give them no constitutional right thereby to build up their business, here a non-common carrier business, a purely commercial warehousing business, contrary to the statutes. Your Honorable Court referred to and settled such a contention in *O'Keefe v. United States*, 240 U. S. 294, 304, as follows:

"The final contention, which is that the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, by denying to it the right to contract and compete for traffic originating on the line of the Louisiana & Pacific, is transparently unsound. The trunk line has no constitutional right to build up its business by paying bonuses, or rebates, that have been forbidden by act of Congress from considerations affecting the public welfare."

Furthermore, appellants knew, or should have known, when they entered, in one form and manner, or another into

the commercial storing or leasing of space for warehousing that the prohibitions of the statute were mandatory. Over forty years ago, in *American Warehousemen's Association v. Illinois Central R. R. Co., et al.*, 7 I. C. C. 556, over thirty years ago in the *New Haven Coal case, supra*, over twenty years ago in *American Pulp and Paper Assn. v. B. & O. R. Co.*, 41 I. C. C. 506, 511, 513, and again in the *Merchants Warehouse case, supra*, more recently, and in the *American Sheet and Tin Plate Company case, supra*, each of the appellants knew, or should have known or learned that such rebating or concession activities to "purchase traffic", could not be held out to be performed at less than the cost thereof. Furthermore, the principles as set forth in the *New Haven Coal case, supra*, have been reaffirmed in many other cases before your Honorable Court, including:

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 477,

U. S. v. P. Koenig Coal Co., 270 U. S. 512, 519,

Louisville & Nashville R. R. Co. v. U. S. (I. C. C.), 282 U. S. 740.

D—Appellants assume their major premises in adducing that the Commission's findings are insufficient in law, and that the services performed are transportation services.

In the first three points argued by appellants, because of the full facts found by the Commission, the premises of the argument are simply assumed; the fourth point is dependent upon the first three. Dealing with points 1 and 2 together; having to do with commercial warehousing services and with space rentals, below cost:

Appellants state they contend that the sole issue now before this Court as to their warehousing practices and leases is the sufficiency of the below-cost finding of the Commission. They claim that under the findings here no section 6 violation appears; that here the shippers must be found to have received something of value and that reasonable worth

measures value; that concessions may occur "(as measured by the prevailing market and other relevant facts)", and that here such prevailing market finding is absent—"That indispensable finding is wholly lacking". (See pp. 18, 19 of appellants' brief.) No section 6 violation may occur, they state, unless there is found the fact that the "concession" exceeds the value of what the shipper pays for it. (p. 26, *ibid*) They claim that no concession arises from mere dissipation of revenues (p. 28, *ibid*),—and presumably they mean under the facts found in this case.

Again, on page 32 of their brief, appellants, in the last line thereof, refer to the prevailing market; on page 33 they use the term "current market prices". Clearly they contend and mean that the Interstate Commerce Commission has made no finding concerning "prevailing market", or going rates, or rates for similar kind of service or rentals in the locality.

Appellants also infer or imply that the Commission's order was premised on a particular finding. (See Summary of Argument, p. 10, Appellant's Brief.) Our "Statement", hereinbefore, clearly disposes of that inference.

As to the contention of appellants about the market value or going rates, or the "prevailing market" for warehousing—storage, handling, insurance, and leasing of storage facilities, and the absence of any such finding in the reports of the Commission:

First, refer to the findings in this record at pages 97, 98, 105, 106, 107, 124, 125, 126, 138, 148, 348, 349, 350. Here, *inter alia*, the Commission found: That the *warehousing rates of appellants were lower than those of private warehousemen*; that obviously the latter could not long endure and sell their services *below cost*; that appellants' *motives* were effectuated regardless of what resulted; that while complaining of confiscation of their properties, the warehousemen (appellees) introduced testimony and exhibits *none of which was refuted* by appellants, showing they, *warehousemen, have lost business in practically every form*.

to appellants' commercial warehousing companies. The Commission, furthermore, found that the space rentals exacted by appellants for their storage facilities are not only below prevailing rates but are non-compensatory. (R. 197, 350)

The Commission, clearly, did make findings about prevailing charges and the market value of appellants' warehousing services, warehouse space and rentals. *It did much more. It found purpose to discriminate—to grab, to purchase—traffic.* This the appellants overlook in their entire argument. They refer to a "basic" finding only. *The Commission went on further: It found certain shippers unjustly preferred and others discriminated against unlawfully—in these activities included in this case. Even large groups of shippers were unjustly preferred. It found the prohibitions of the statute ignored—no due regard to expenditures—and these purposed to purchase traffic, where conflict of interest was to beat down, go below, the others' offer—a shippers' market resulting and the larger shippers benefiting—and the "viscious circle" and willful purpose of these appellants took the charges for warehousing services and such space rentals to below their costs!** The purposes were clear, if only arrived at from the mere fact that these appellants undertook to and did construct and put on the market a 25 per cent increase in facilities, in a few years, when the then existing warehouses were not reasonably occupied.

So the Commission cannot be charged with no findings regarding going charges, existing rates—competitors' price for services or space—the prevailing market—for the many findings are self-speaking. Here a defying disregard of any market or prevailing charges, and a purposeful pay-

* Some light is shed on these findings in the testimony of Mr. Tilly, President of the New York Dock Company, at page 1761 of the transcript of testimony: "We do object very violently, however, to the carriers taking merchandise at a mere fraction of their cost, absorbing the difference elsewhere from their services"


ment of losses suffered by cutting even way below costs to purchase traffic, is clearly pictured by the Commission's findings.

The findings of the Commission support fully its order. The specially-constituted Court found that, re each of the appellants here, the Commission had, on facts found as set forth by the Court, and on other findings as made in its reports, *supra*, arrived at its conclusions. (R. 378, 382, 386, 390, 393, 398, 401; 367, 368, 369; 373)

But what of sections 2 and 3 violations of the Act, as well found. Nothing is said thereupon by appellants. Certainly fractional cost charges of appellants can not be taken as "market," with the resulting "concessions" from line haul rates. Appellants do not consider the Commission's findings re section 15a. (R. 197, 198).

Appellants refer to the shipper getting something of value—citing *Wight v. U. S.*, *supra*, and contend this must be so found if there be violation. In that case the shipper received nothing of value. The carrier may have, for it obtained the traffic of that shipper. The consignee routed it over that carrier (the B. & O.) when it could have sent it, without the haulage service being necessary, over the Panhandle Line. It cost the B. & O. the full allowance (later made) to truck the beer from its line. The shipper received the B. & O. service at the same price as the Panhandle service. Actually there was nothing of value accorded him in this allowance.

The *American Tin Plate Case*, and the *New Haven Coal Case*, *supra*, have been hereinbefore analyzed. Assuredly appellants recognize that if the charges for their commercial warehousing services to shippers are below prevailing market—as found here—there is something of value given. Although here there is something of value given, that is not a requisite for a "concession." Just as in *Wight v. U. S.*, *supra*, nothing of value accrued to the shipper, so here the discriminations do not require, although they have, such buttress to support them. This takes us through appellants'

argument, void of the controlling law in the *Merchants Warehousing case*, *supra*, and the *New Haven Coal case*, *supra*, and others similarly cited hereinbefore. 

And in this connection appellants refer to the Commission's settled administration of the act (see page 31 of appellants' brief). They cite the case of *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, and quote three paragraphs from which to infer that the prevailing market, existing rates and rentals, the reasonable value, should be the basis for a decision of the Commission, even under the facts in the instant case. They fail, however, to take into consideration the expressly stated position of the Commission in that case (p. 682), concerning leases resulting in some violation of the laws administered, which the Commission so expressly and in great detail has found in the instant case. In *Leases and Grants by Carriers to Shippers*, *supra*, at page 682, it is set forth that:

"Such violations may occur when the terms and conditions of the lease are so favorable to the lessee that it is clear that the real consideration for the lease must in part be found elsewhere, namely, in the freight which he ships over the lines of the lessor carrier."

In this case, *supra*, the situation at Spokane was illustrative of the practices investigated. While traffic considerations, as noted at page 679 of the Commission's report, were involved in the proceeding, it distinctly stated, at the bottom of page 681 that no shipper or receiver of freight at Spokane complained of the leases by the carrier—and, at the top of page 682—that none alleged undue prejudice or preference. In this connection the Commission pointed out in its conclusion, at the bottom of page 683, that shippers and others who believe that they are subjected to undue prejudice and disadvantage can be of assistance by bringing such situations to the Commission's attention. The proceeding was discontinued and no order was deemed necessary. The Commission explicitly set forth that it went

no further in its report in that case than to indicate some of the principles to be borne in mind by the carrier. There it did not have to deal with costs. Very low costs, if any—due to land-grants—were therein involved. Also, as it clearly appears, no shipper or receiver of freight even, complained of undue preference or prejudice. Purchasing traffic regardless of cost was clearly not a point for the Commission's consideration in this 1922 case. It is pointedly involved in the instant case.

The settled administrative practice of the Commission clearly is that when the practical effect is to reduce the transportation charge in the carriers' tariffs, quite a different situation exists, and particularly when violations of law which can be cured only by charging an amount equal to the costs involved, flagrantly occur. The situation and detailed facts in the case just cited readily are distinguished from those in the instant case, and in that case the Commission recognized certain circumstances may exist in other cases which amount to purchasing traffic, as here so definitely is done.

Appellants cite and quote from *Wharfage Charges at Atlantic and Gulf Ports*, 157 L. C. C. 663, 692, but their quotation, appearing at the bottom of page 31 of their brief, is merely a re quotation by the Commission in that case from the case just analyzed, *Leases and Grants by Carriers to Shippers, supra*, as also appears on page 691 of the *Wharfage Charges at Atlantic and Gulf Ports* case. Furthermore, on that same page 691, the Commission, *inter alia*, stated:

"That where it clearly appears that the traffic of the lessees is in part the consideration for the lease, the conclusion follows that the transaction amounts to a concession to the shipper-lessee, in violation of the Elkins Act and sections 2 and 6 of the interstate commerce act."

But regardless of all this, under the settled administrative practice of the Commission and the Courts, as exempli-

fied in the cases hereinbefore cited, it is obvious that even nothing of value need move to the shipper to establish discriminations flowing from a "concession" from the line-haul rate, particularly when facts found definitely and clearly, establish an "allowance" or "concession"—rebate—from the transportation tariffs of the carrier's charges, as so fully set forth in the concise and coherent findings and reports of the Interstate Commerce Commission in this case.

In the appellants' third point of argument they endeavor to arrive at a statement, merely by inference, that they are storing, etc., freight "in transit", an "in-transit service." Then they move over from calling this commercial warehousing of freight, so warehoused under the in-transit privilege of the carriers' tariffs, to a term which is a little more inclusive, differing from the so-called storage "in-transit service", as used on page 38 of their brief. This more inclusive term, on page 39 of their brief, is simply that the "intransit service" is a "transportation service". Then on page 40 they argue that they should not be required to get "cost" for this "in-transit service" because it is a "transportation service".

We shall not repeat here the many explicit and definite findings of the Commission with regard to what is commercial warehousing service performed by these carriers under their regulations and practices, and what is transportation service. This, as set forth *supra*, the Commission, in the proper exercise of its power, has definitely determined. We shall refer only to the Commission's third report and to section 6 of the Interstate Commerce Act.

In its third report (R. 271) the Commission condemns these practices of the carriers, appellants,

" * * * not within their common-carrier obligations,
 * * * The tariffs now on file are instruments which
 work violations of the act, in that * * * (under the
 guise of performing transportation services) * * *
 [appellants] violate sections 2, 3 and 6 of the act".

So when the Commission permitted, or required that the carriers file some kind of tariffs covering these commercial practices and charges, they simply concluded that because of their administrative practices of many years these commercial services should be set forth in tariffs and filed with them. By no means did they state that these commercial services were "transportation services"; they simply required the filing of them under the authority under section 6(1) of the Interstate Commerce Act, wherein the Commission has authority to require tariffs covering "all other charges" of a common carrier under its jurisdiction (*infra*, p. 65). The Commission must know certain things and can require any records or the filing of any charges by way of tariffs, or otherwise, that it needs in effectuation of its administrative obligations under the act. It is clear, therefore, that the premises of appellants under this third point in their brief are merely assumed. The Commission's findings that these are not transportation services suffice, particularly since the evidentiary background buttressing those findings is not even questioned.

Suppose, however, that appellants were correct and that these commercial warehousing services performed under the in-transit privilege were transportation services, appellants even then could not gainsay the findings of the Commission thereunto relating respecting discriminations arising from concessions,—less than cost provision of the services,—from the line-haul rates, discriminations in violation of sections 2 and 3 of the act. It is also respectfully submitted that appellants have completely disregarded the findings of this Commission (R. 197-198) that these allowances from the line haul rates through the appellants' storage practices—including handling and insurance—re this west-bound freight, etc., including also the space rentals in these storage practices, *dissipate* appellants' "funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest".

CONCLUSION.

The American Warehousemen's Association, Merchandise Division, Appellee, respectfully submits that the Interstate Commerce Commission has lawfully exercised its authority in this case and has only performed its duties in making the findings noted; and that the findings of the Interstate Commerce Commission, taken at their full and face value, are sufficient in law to support the Commission's order of February 2, 1937. Wherefore, it is respectfully submitted that the decree below should be affirmed, with costs upon appellants.

November, 1938.

Respectfully submitted,

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APPENDIX.

The following are the portions involved in this case of sections 1, 2, 3, 6, 15, and 15 (a) of the Interstate Commerce Act and section 1 of the Elkins Act.

Sec. 1 (3) [As amended February 28, 1930, June 19, 1934, and August 9, 1935.] [U. S. Code, Title 49.] The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotive, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Sec. 1. (4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facil-

ities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 1 (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Sec. 2 [As amended February 28, 1920, June 19, 1934, and August 9, 1935.] [U. C. Code, title 49, sec. 2.] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the

provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3 [As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935.] [U. S. Code, title 49, sec. 3.] (1). It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 6 [As amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920 and August 9, 1935.] [U. S. Code, title 49, sec. 6.] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common

carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Sec. 6. (2) Any common carrier subject to the provisions of this part receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this part, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Sec. 6. (3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance

with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

Sec. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the trans-

portation of passengers or property, except such as are specified in such tariffs.

Sec. 15 [As amended June 29, 1906; June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935.] [U. S. Code, title 49, sec. 15.] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed; and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classifica-

tion and shall conform to and observe the regulation or practice so prescribed.

Sec. 15 (a) [Added February 28, 1920; amended June 16, 1933.] [U. S. Code, title 49, sec. 15a.] (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

Sec. 15(a) (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

Elkins Act, 49 U. S. C., sec. 41 (1):

"* * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall be any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

October 10, 1900

The Board of Commissioners of the District of Columbia

The Board of Commissioners of the District of Columbia

APPEAL FROM THE DECISION OF THE BOARD OF COMMISSIONERS

FILED FOR THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

November 1900

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 133

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION

OPINIONS

The opinion of the specially-constituted District Court (R. 302, 311), *Baltimore & O. R. Co. v. United States*, is reported in 20 F. Supp. 273 and 917.

The reports of the Interstate Commerce Commission (R. 29-115; 120-199; 269-271, entitled *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at*

Port of New York, N. Y., are reported in 198 I. C. C. 134, 216 I. C. C. 291, and 220 I. C. C. 102.

QUESTIONS PRESENTED

In a proceeding instituted upon its own motion, following complaints by numerous commercial warehousemen in the Port of New York district, and after full hearing, the Commission found that the appellants, seven trunk-line railroads serving New York, are there engaged extensively in voluntary, commercial warehousing and storage, beyond their duties as common carriers to perform, and, in their competition one with another for line-haul transportation, offer and give to certain interstate shippers commercial warehousing services or warehouse space at charges or rentals below the cost of performing such services or providing such space, in order to induce the movement of traffic over their respective lines, drawing upon their revenues derived from the line-haul transportation to recoup the losses from the warehousing at below-cost charges, with the result that the traffic of these shippers is transported at rates less than those specified in the published tariffs, in violation of section 6 (7) of the Interstate Commerce Act, while other shippers are charged the full line-haul tariff rates undiminished by below-cost warehousing and are thus subjected to unjust discrimination and undue prejudice, in violation of sections 2 and 3 of the Act,

and the carriers' revenues and funds are dissipated in substantial amounts, contrary to efficient and economical management and contrary to the public interest. To correct these violations of the Act, the Commission requires, by order dated February 2, 1937 (R. 272-274), that the carriers shall cease and desist from performing such commercial warehouse services or providing space for commercial warehousing, for interstate shippers over their lines, at rates and charges which fail to compensate them for the cost of performing the services or providing the space.

The question presented is the validity of this order. Subordinate questions are:

(1) Whether the Commission's findings are adequate to support the order.

(2) Whether certain of the warehousing services performed by appellants, viz., storage, handling and insurance of goods stored in the New York district after a short movement within the district and subject to reshipment within periods ranging up to three years, at the through rate, are in fact commercial services, as found by the Commission, or whether they are "transportation" services which the carriers may, on that ground, lawfully perform at below-cost charges.

STATUTES

The pertinent statutory provisions are printed in the Appendix, *infra*, pages 122-127.

4

STATEMENT

This is an appeal from a final decree of the court below (R. 406) dismissing, for want of equity, a joint petition filed by the seven appellants¹ (R. 1) to enjoin and set aside the Commission's order (R. 272) of February 2, 1937, in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part VI, Warehousing and Storage of Property at Port of New York, N. Y.*

Appellants are trunk-line railroads which serve the metropolitan district of New York City and have lines running westwardly through trunk-line territory and beyond. They are keen competitors for the New York traffic, both eastbound and westbound. Competition for the westbound traffic is especially sharp, since the New York District is a point of origin on each of their lines and a tremendous volume of westbound traffic, both import and domestic, originates there. The New York Central, the Pennsylvania, the B. & O., and the Erie each has its own line from New York to Chicago. The Lehigh Valley and the Lackawanna extend from New York to Buffalo, and the Jersey Central from New York to Scranton. Either direct with their own lines or by through routes and joint rates with connecting railroads, these seven carriers compete for the transportation of this, an important

¹ The common designations of these carriers, viz., B. & O., Jersey Central, Lackawanna, Erie, Lehigh Valley, New York Central, Pennsylvania, are generally used herein.

part of the country's commerce. As shown herein, the Commission found that their competition for this traffic motivated their entrance into the commercial warehousing business, accounted for the rate cutting in warehousing services, space rentals, etc., to below-cost levels with consequent large revenue losses, and the discriminations and other violations of the Interstate Commerce Act found by the Commission, the abatement of which is the purpose of the order here challenged.

Certain other railroads serving New York, notably the New York, New Haven & Hartford and the Long Island Railroad, were also respondents in the Commission proceeding, but it was not found that they engage in the warehousing practices condemned in the Commission's reports and the order is not directed to them.

Sixty-five warehouse companies, not affiliated with either the appellants or any other railroads, are engaged in the commercial warehouse business in the Port of New York district. Their warehouses are located in Manhattan, Brooklyn, Jersey City, Hoboken, Newark, and other sections of the port district. Forty-three operate merchandise warehouses, 22 operate cold storage warehouses. Their principal business is the storage for long or short terms, assembling, handling, and distribution of freight, and incidental services in connection therewith. (R. 125-126, 346)

The goods warehoused and stored by them are shipped in interstate commerce to and from all sections of the United States over appellants' lines, and their business is dependent for existence upon the appellants' transportation services coupled with reasonable and nondiscriminatory rates and practices. (R. 96, 97, 346)

These warehousemen, through a protective committee, brought to the Commission's attention the warehousing practices of the railroads serving the New York district, averring that warehouses owned or controlled by the railroads, or in which they have financial interests, were being operated in a manner which precluded the complaining warehousemen from obtaining much of the business, that the complaining warehouses were losing much of their business to railroad or railroad-affiliated warehouses, that they could no longer meet the competition of such warehouses. (R. 31) They alleged that the railroads' warehousing practices violated sections 2, 3, and 6 of the Interstate Commerce Act, and dissipated the carriers' revenues. (R. 344)

The Commission instituted an investigation and after extensive hearings and usual procedure issued its report, (198 I. C. C. 134). It found that these railroads, departing from their duties as common carriers, have entered the field of commercial warehousing of both the merchandise and cold storage type, and are engaged extensively in that

business, in competition with the complaining warehousemen, in the New York district. (R. 35-36, 103, 104, 105, 122, 124, 188, *et seq.*, 271.)

Prior to 1926, the B. & O. and the Jersey Central had engaged in the business in a relatively small way, the B. & O. having constructed a warehouse in Manhattan in 1914 and the Jersey Central one in Newark in 1906, located upon and served exclusively by their rails, and had operated them as commercial warehouses through controlled subsidiary companies. (R. 42-47; 52-54, 352)

During the period from 1927 to 1934, there was great expansion in the business by appellants, with intensive competitive building of large new warehouses by them. The first of these, completed November 1, 1927, was the 10-story warehouse of the Seaboard Terminal & Refrigeration Company, sponsored by the Erie and located upon its rails in Jersey City. This was followed by the Lehigh Valley's 12-story Bronx Terminal warehouse, constructed in 1929 and its Starrett-Lehigh building, on 27th Street from 11th to 13th Avenues, completed in 1930. The Lackawanna Terminal Warehouse, an 8-story building, constructed by the Lackawanna on its tracks at Jersey City, was completed in April 1930. At about the same time the Pennsylvania completed its Harborside warehouse in Jersey City. The New York Central, in 1930, constructed its Kingsbridge warehouse, in the Bronx, a 6-story building, and in 1934 its St. John's

Park Terminal building in lower Manhattan. (See Court Findings 34-41, 350-352.)

The total railroad outlay in connection with these warehouses for commercial operations was approximately \$25,000,000. (R. 112, 114) The result is that each of these seven carriers has one or more warehouses on its rails in the New York district and either directly or through a subsidiary company engages in the commercial warehouse business.

This business, which is distinguished from the storage involuntarily performed by carriers generally as an incident of transportation, is of the same general type as that engaged in throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangements and dealings with patrons of warehouses. (R. 35, 124)

Most of the warehouses above mentioned are operated by appellants through subsidiary corporations which are dominated and controlled by appellants.² Where this is the case the storage and warehousing operations generally are conducted in the name of the subsidiary company.

In addition to those warehousing activities, each of the seven appellants is engaged, directly and in its own name, in the capacity of commercial warehouseman, in competition with the complaining

² See R. 42, 56, 59, 68-70, 70-71, 77, 82, 87-91, 106-107, 128, 135, 136-137, 144, 149, 150, 153, 155-156, 159-160, 170, 175.

commercial warehousemen in the Port of New York district, in the warehousing and storage of goods stored under the storage-in-transit privilege. (R. 352)

Under this privilege, goods arriving in New York Harbor by vessel are unloaded at shipside and moved by the rail carrier to the warehouse, under a bill of lading showing the warehouse as the destination. At the time of this movement to the warehouse, freight charges are collected at the local rate specified in the tariffs. If the goods are forwarded from the warehouse to a western destination over the line of the same carrier and within a specified time (varying as to different commodities, e. g., crude rubber 2½ years, unmanufactured tobacco 3 years, other commodities 1 or 2 years), freight charges are collected on basis of the through rate from shipside to final destination, which through rate in all instances is the same as the rate from the warehouse, and a refund is made of the local inbound freight charges. (R. 38, 105, 181, 353-356)

Substantially uniform rules and regulations relating to this privilege are published in separate tariffs of the appellants which are filed with the Commission. These tariff provisions govern the application of appellants' transportation rates; they have no relation to the rates and charges for the warehousing or storage service itself. (R. 353-354) Appellants' rates covering these warehousing services are also published in their tariffs, that

is, rates covering the storage and the labor or "handling" charges into and out of the warehouse, also their charges for insuring the goods stored. These rates and charges are fully shown in the Commission's reports. (R. 38-39; 102, 179-180, 181-182, 192-196) The storage, handling and insurance charges of each of the appellants are with one or two minor exceptions identical.

For this storage appellants utilize space in their pier buildings and in several instances in the warehouses of their subsidiary warehouse companies; in one instance space is rented by the carrier (B. & O.) in warehouses of independent companies (American Dock Stores and Pouch Terminal Stores, on Staten Island, served by B. & O. rails). (R. 354-356)

Storage under this transit privilege is usually long-term storage, as long as three years, is of entirely the voluntary type of solicited storage business as distinguished from involuntary storage which every carrier necessarily performs as an incident of transportation (as, for example, where the consignee fails to take prompt delivery of his goods) and, the Commission found, is commercial storage, not within common-carrier duties. (R. 35-36, 47-49, 103, 128, 181, 188-191, 196, 197, 271, 352-358)

Substantial volumes of goods are warehoused and stored by the appellants under this storage-in-transit privilege, the tonnages stored during 1933 for example being 152,746 tons of rubber, 33,570

tons of wood pulp, and 65,914 tons of various other commodities such as coffee, sugar, flour, soap, etc., or a total of 252,230 tons (504,460,000 pounds), equivalent to 12,612 carloads of 20 tons each. (R. 186-187, 354).

The Commission found that appellants' charges for this storage, and for handling and insurance in connection therewith, are far below their costs (one-half or even a smaller fraction), and that their losses from this storage, handling and insurance are heavy. (R. 354, 185-188, 112, 115)

"At New York," the Commission found "respondents now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies. The forms of title to the warehouses are various. In a number of instances the respondents lease all or parts of buildings for warehouse operations; in others they own the ground, aided in financing the structures located thereon, and lease from their own subsidiaries space in such buildings; and in still others they own the land and structures, but lease them in entirety or in large part to subsidiary corporations for warehouse operations. In the variety of such arrangements the result is always the same, namely, possession and control of warehouse facilities available to serve whatever *competitive* purposes railroad management may have in mind." (R. 35)³

³ Emphasis supplied here and in all other quotations in this brief.

After reviewing the warehousing activities of the seven carriers in some detail, pointing out many instances of storage, handling and insurance at below-cost rates, the granting of free services and unwarranted allowances, the renting or leasing of warehouse space and in some instances of entire warehouses at unduly low and noncompensatory rentals, and other wasteful practices (R. 42-96), the Commission found that appellants' motive "in engaging in the commercial business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines." (R. 105)

Directly or through their dominated and controlled subsidiaries, they "seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen." (R. 105) While they charge all shippers alike the tariff rates for rail transportation (R. 108) the lowering of their warehousing charges lowers the aggregate charge for transportation and warehousing, and such aggregate charge "influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services." (R. 36)

The competitive situation resulted in reducing the carriers' warehousing charges to such a low basis that they became far below their costs of fur-

nishing the service, and large revenue losses resulted. (R. 111-115)

The losses during one year, 1931, the Commission found, from the operation of the carriers' warehouse and storage operations aggregated \$1,260,441. (R. 112, 115)

The losses from their storage in the New York district of goods stored under the storage-in-transit privilege during the year 1931 ranged from \$1.28 to \$6.18 per ton. (R. 112, 115) In some instances this loss from the storage operations in New York reduces by more than half the carriers' line-haul rate for the transportation of the goods, and in other instances the loss is so large that no revenue whatever is left from the line-haul transportation. (R. 48-49; 146; 182-183)

The appellants, the Commission found, are little concerned "that the charges for the warehousing services and space furnished are not compensatory, *because they expect to recoup any losses through the revenues derived from rail transportation.*" (R. 105)

The Commission found that the seven trunk-line respondents "have extended financial aid to their various warehouse affiliations." (R. 97) The complaining warehousemen, referred to as the complainants, contended that this aid amounts to subsidies and rebates and subjects them to unjust discrimination and to undue and unreasonable

prejudice and disadvantage, and makes it impossible for them to solicit or handle any business without taking into consideration the respondents' storage practices, rates, and charges, *and meeting these on a competitive level.* They contended that they are precluded in practically all cases from meeting the less-than-cost rates for storage, handling, and insurance, *which respondents offer as an inducement to secure traffic for their lines.* (R. 97)

The Commission found that "It is well understood that the controlling fact in the mind of a warehouse patron is the aggregate cost of the transportation and warehouse services, and the assumption of any part of the warehouse charges by the carrier enables the warehouse performing the service to offer rates which complainants cannot meet." (R. 97)

After observing that "the solicitation of goods for warehousing is an important activity in the conduct of the business," the Commission found that "respondents have and use their active and efficient traffic departments for the solicitation of business throughout the country," while the complainants, with their smaller forces, cannot compete in this respect. (R. 97)

Complainants contended that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider (and what the Commission found to be) trade activities and not common-

carrier service. The Commission found that complainants "offered testimony and exhibits, *neither of which was refuted by respondents*, which show that they have lost business in practically every form of warehousing to the respondents' affiliated warehouse and storage companies." (R. 97-98)

The complainants claimed that participation of the railroads in warehousing is destructive in the same degree to their (the railroads') competitors therein as it would be destructive to manufacturers of any commodity which the railroads might attempt to manufacture, for the reason that the railroads are not dependent on profit arising from their warehouse activities. Complainants also pointed "to the large financial losses of respondents in their warehouse activities, and to the fact that they can use their freight revenues to offset their losses which the competing warehouses cannot do." (R. 98)

Warehousing and storage, the Commission found, are highly specialized businesses, as many commodities must be segregated and many require special equipment in handling. A commercial warehouseman can choose the commodities he wishes to store, as it would not be practicable for any company to build many special-commodity warehouses to store any and all commodities offered. "The tenor of complainants' testimony was to the effect that the competition of the railroads would ultimately drive independent warehousemen out of business, with

the result that railroads would then be called upon to deal in all of the various forms of specialized storage." (R 98)*

Distinguishing between storage, which is within the meaning of the term "transportation" as used in section 1 (3) of the Act, and within the duty of the carrier to perform under section 1 (4), on the one hand, and voluntary or solicited storage business, which is beyond common-carrier duty, on the other hand, the Commission said:

The term "transportation" as used in section 1 (3) of the act includes the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. Under section 1 (4) it is made the duty of every common carrier subject to the act engaged in the transportation of property to provide and furnish such transportation upon reasonable request therefor. While storage of property is clearly within the transportation

* As a commercial warehouseman, a railroad company's duties and obligations are not those of a common carrier but of warehouseman only. Since commercial warehousing is not "transportation" as defined in section 1 (3), it is not within the purview of section 1 (4) requiring carriers subject to the Act to furnish "transportation" upon reasonable request, cf. *Director General v. Viscose Co.*, 254 U. S. 498, 503-504, *Lake and Rail Rates*, 29 I. C. C. 45. Therefore the Commission could not require the carriers to furnish commercial warehousing service, nor would mandamus or injunction issue to compel them to do so. Cf. *Louis. & Nash. R. R. v. Cook Brewing Co.*, 223 U. S. 70, 83; *Missouri Pacific Ry. v. Larabee Mills*, 211 U. S. 612, 619.

service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal. *State v. Southern Pacific Company*, 52 La. Ann. 1882; 28 So. 372; *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169. (R. 103.)

"It is clear," the Commission said, "that much of the warehousing or storage services under consideration here and the handling necessary in connection therewith is not storage incidental to transportation but is commercial storage. Compare *Merchants Warehouse Co. v. United States*, 44 Fed. (2d) 379, affirmed 283 U. S. 501" (R. 104-105), and "is not such as the carriers are required by the act to furnish." (R. 103)⁵

⁵ The report as a whole makes it clear that all warehousing and storage referred to therein is commercial storage except that performed under the Jones Storage tariff, applicable generally throughout the United States, which names high storage rates, designed to compel consignees promptly to remove their goods (usually l. c. l. lots) from the carriers' freight stations. These storage charges are stated in the report, under the heading "General Storage Charges," (R. 40) and it will be noted they "do not apply on traffic stored in warehouses owned and operated by the carriers exclusively as storage warehouses." In other words, these "transportation" storage charges do not apply at the commercial warehouses operated by appellants.

The general storage charges are infinitely higher than the commercial storage charges—as much as 70 times higher

While holding that it had no jurisdiction to require a railroad to cease engaging in a business or activity not within its duty as a common carrier in interstate commerce, the Commission said a different situation is presented where the performance of such services is so related to the performance of common-carrier duties and of such character as to create a violation of the Act because it is established that in such circumstances the Commission is vested with ample authority, citing *Warehouse Co. v. United States*, 283 U. S. 501. (R. 103-104)

The Commission found that the private warehouse companies are "persons" within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act, and the charges which they are required to pay and the treatment they are accorded by carriers subject to the Act are subject to the provisions of these sections, as well as the provisions of the Elkins Act, and as shippers they are

on 100-pound bags or sacks stored one month under the westbound storage-in-transit privilege: 70.5 cents as against 1 cent. (R. 40)

The carriers do not file their *commercial* warehousing rates with the Commission, except those covering the storage, handling, and insurance under the storage-in-transit privilege.

Cf. *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, and *Southern Ry. v. Prescott*, 240 U. S. 632, which are examples of storage incidental to transportation, of the involuntary type, due to the failure of the consignees to take prompt delivery of the goods after arrival at destination.

to be dealt with in accordance with the provisions of the Act, citing *Warehouse Co. v. United States*, *supra*. (R. 109-110).

It recognized, however, that the rail carriers are under no obligation to place their charges for warehousing services on a basis which will insure a profit to private warehouses, if the carriers' charges meet the provisions of the statutes. (R. 110)

"But regardless of the effect upon private warehouses the carriers are bound to comply with the law even though such compliance necessitates changes in rates and practices that were designed to attract traffic to their facilities." (R. 110).

The Commission found that the present rates and practices of the rail carriers, as considered in the report, cannot be justified upon the ground that the aggregate charges are not unreasonable as not all shippers are afforded the same aggregate charges for like and contemporaneous services. (R. 110)

The Commission then found that the situation here presented is analogous to that considered by this Court in the *New Haven* case (*New Haven R. R. v. Interstate Com. Com.*), 200 U. S. 361, in which the Court reached a negative decision upon the question "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold when the price stipulated in the contract does not pay the cost of the purchase, the cost of delivery, and the published freight rates?" This

question, the Commission said, can properly be paraphrased to cover the situation here presented, follows:

"Has a carrier engaged in transporting commodities in interstate commerce the power to furnish directly or indirectly storage or warehousing facilities not within its common-carrier duty and to act as a private or commercial warehouseman when the amounts received from such storage and transportation are not sufficient to pay the cost of such storage without a concession from the published freight rates?"

"This question," the Commission concluded, "clearly must be answered in the negative, and it follows that if respondents are to continue engaging in such business their charges directly or indirectly for storage or warehousing, and for privileges or services rendered in connection therewith, must be put on a basis which, entirely independent of freight rates, will reimburse respondents for the full costs of such services." (R. 110-111)

The Commission concluded that the respondents' warehousing practices violate sections 2, 3, and 6 of the Act. "Although the carriers charge all shippers alike the tariff rates for rail transportation," the Commission said, "it is obvious that the according of noncompensatory warehousing charges and rental to some shippers and not to all is equivalent to a deduction from the charges for transportation to some shippers and not to others for like and contemporaneous service. This is clearly prohibited

by section 2 of the act. It is likewise clear that the shippers receiving the benefit of such noncompensatory charges are given undue preference or advantage in violation of section 3 (1) of the act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate undiminished by any such benefits. These violations are added to in some cases by the free loading and unloading of carload freight, or payment of allowances therefor, and the handling of freight into and out of storage at less than compensatory rates." (R. 108-109)

The Commission further found that these practices lead also to violations of section 6 (7) of the Interstate Commerce Act, and that the evidence of record also affords reasonable ground for the belief that the carriers have violated and are violating the provisions of the Elkins Act. (R. 109)

The Commission then referred to *competitive waste*. It said that "apart from the requirements of the statutes previously discussed, the competitive waste involved in the practices dealt with herein is deserving of most careful consideration." These practices are similar to those considered in *Duplication of Produce Terminals*, 188 I. C. C. 323, wherein the Commission directed attention to the *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 585, in which it said:

The new competitive conditions make it necessary, also, for the railroads to cooperate more efficiently with each other and re-

duce the waste, both in service and in rates, which has marked their own competition. That this waste is of very large proportion is clear. Many specific instances have been brought to our attention. That it can be minimized we also have no doubt, * * *. The record shows that in the past decade the railroads have made great strides in improving their service and at the same time operating with greater efficiency and economy. But what they have done in this direction has largely followed lines which developed under conditions different from those which now prevail, and it has been characterized by a continual intensification of their own competition, at a time when as an industry they have new enemies to face, and warfare with each other has grown more bitter, so that *economies in operation have been offset in part by the growth of competitive waste.*

All this is contrary to the spirit of the Transportation Act, 1920. Congress then looked beyond the individual railroad to the concept of a national transportation system. It pointed the way in the consolidation provision to the reduction of competitive wastes. It went to the extreme of removing the barriers of restrictive Federal and State anti-trust legislation which might otherwise stand in the way. * * *

The matters and transactions referred to in the present report, the Commission said, "are further illustrations of serious waste resulting from the

competition of railroads with each other for traffic. The extent thereof is indicated by the statements contained in appendixes I to III. * * * These losses are added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. The private warehouse interests estimate the total annual losses to be \$3,152,119.63." (R. 112)

"It seems unnecessary," the Commission said "to dwell at length upon the development and results of the situation here presented. The evidence clearly shows that the carriers themselves are fully aware of the situation."

"Whether or not initial advantages may have been realized at one time or another, by individual carriers, *the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.*" (R. 112-113)

The Commission found "that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest." (R. 113)

The respondents were admonished to take prompt corrective action, and all carriers subject to the Act were admonished that their practices

and charges should be adjusted in conformity with the principles announced in the report. (R. 113)
No order was issued at that time.

Rehearing

No order having been issued with the report, the carriers had the opportunity to correct their warehousing practices, so as to bring them into conformity with the law, by voluntary action. Although recognizing the existing evils as pointed out in the report, the carriers failed to comply with the Commission's suggestions for their correction.

By order dated May 6, 1935—about a year and a half after the date of the report—the Commission reopened the proceeding and further hearings were held. A mass of additional evidence was taken and further briefs were filed. June 8, 1936, the Commission issued its report upon further hearing, 216 I. C. C. 291.

In this report the Commission found that while some changes had been made, most of the practices and charges condemned in the prior report had not been corrected. (R. 125)

It was found that the losses from the carriers' warehousing activities referred to in the prior report had continued:

The present practices and charges, as later shown, result in heavy losses not only to respondents, but also to competitive commercial warehouse companies. (R. 125)

"There is not enough business to fill all of the warehouses in the Port of New York district," the Commission found. "At the time of the further hearing at least 22 warehouse companies operated cold-storage warehouses in that district. Up to the close of the year 1930, the cold-storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in that district, and within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market. This was an increase of about 25 percent over the amount of space that had been put on the market by all of the public warehouses in that district during the preceding period of 50 years or more. At the time these two warehouses were opened for operation there was an unused occupancy of at least 30 percent of the then existing facilities, and at the time of the further hearing there was less than a 50-percent occupancy. This excess capacity and resulting competition have reduced the cold-storage warehouse rates for handling and storage to subnormal levels. At the time of the further hearing at least 43 warehouse companies operated merchandise warehouses, other than cold storage, in the Port of New York district. During a period of 70 years up to that time, these warehouse companies had placed 20,450,000 square feet of warehouse space on the market in that district, and within six years subsequent

to January 1, 1929, the respondents or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 percent." (R. 125-126)

This was followed by the important finding:

The record indicates that because of insufficient prospective earnings, it would not have been possible to have raised capital with which to have constructed the new warehouses without the use of railroad credit and funds. (R. 126)

"Because of the competition it is difficult, if not impossible, to adhere to any fixed standard of rates for storage or the rental of space." (R. 126)

The Commission affirmed its prior holding that the "warehousing operations of the respondents, carried on through railroad departments, subsidiary companies, or affiliated companies" are "in all respects voluntary warehousing activities; such as 'are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangements, and dealing with patrons of warehouses.'" (R. 124; compare R. 35-36, 189)

The Commission affirmed certain other important findings made in its prior report (R. 123, 124-125, 126-127), and then considered the warehousing activities of each individual respondent, especially as carried on through subsidiary warehouse

companies, followed, in each instance, by a "Summary of Principal Findings of Fact."*

Without attempting here to summarize the many facts found, it may be said, in general, that the Commission affirmed the conclusions it had reached in the prior report, that the appellants, in their warehousing practices at New York, under various circumstances fully described in the report, violate sections 2, 3, and 6 of the Act.

There was separate discussion of "Storage of Eastbound Carload Freight at New York." (R. 176-179)

The Commission then further considered the important subject of storage by the appellants under the westbound storage-in-transit privilege. (R. 179-198)

Further findings as to appellants' storage and incidental services under storage-in-transit privilege granted on westbound traffic

After the first hearing, and in view of findings in the examiner's proposed report, appellants made a cost study which shows, the Commission

	<i>Summary</i>	
*B. & O.-----	R. 128-135	R. 135-136
Lackawanna-----	136-144	144-146
Lehigh Valley-----	149-152	153-154
Central of N. J.-----	154-159	159-160
Erie-----	160-165	165-166
New York Central-----	166-169	169-170
Pennsylvania-----	170-175	175

The summaries restate only a few of the important facts in each instance and should not be accepted as complete statements to the exclusion of the facts found in the preceding text.

found, that their charges for storage and handling on all commodities were, and on crude rubber and wood pulp, still are, far below the costs incurred in performing the service, as thus determined by the appellants themselves. (R. 186-188)

These studies were made early in 1934 and covered the storage and handling costs on commodities stored by them during the year 1933. Each of the carriers compiled figures showing the cost, including interest on investment (at 5%), maintenance, taxes, insurance, watchmen, light, power, overhead, and incidental items on the warehouse facilities used by it for storage. Then average figures for all of the seven carriers were compiled. (R. 186, 359-361)

Taking rubber, the most important item from a tonnage standpoint, for example, the cost study showed that the average cost for storing 152,746 tons of that commodity during 1933 was 50.46 cents per ton per month. Contrasted with this cost was the carriers' rate of $11\frac{1}{2}$ cents per cwt., or 30 cents per ton, for the first 30-day period or less, and $\frac{1}{2}$ cent per cwt., or 10 cents per ton, for each succeeding 15-day period or fraction thereof. (R. 187, 360-361)

The average handling cost was found to be 44 cents per ton.' (R. 186, 361)

' The carriers' handling charge on rubber is 1 cent per 100 pounds or 20 cents per ton.

The Commission's findings regarding handling are summarized in findings Nos. 64-84 of the court below, R. 358-363.

When rubber was stored for one 30-day period and two handlings were necessary, the average cost was \$1.3846 per ton, made up as follows (R. 187):

	Per ton
Cost for storing for 30-day period.....	\$0.5046
Handling in.....	.44
Handling out.....	.44
Total.....	\$1.3846

Since the rate for storage was 30 cents a ton for one month and the rate for handling in 20 cents a ton and handling out 20 cents a ton, it results that the total charge for a 30-day storage plus the handling was 70 cents a ton, as against the above shown cost of \$1.3846 a ton. The carriers' charge is thus 68.46 cents a ton less than their costs according to their own figures.*

"In most cases," the Commission said "it is not contended on this record that the rates under the in-transit tariffs compensate the carriers for the cost of storage and handling. No pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory, and one prominent traffic witness for respondents, when asked if he knew the out-of-pocket loss incurred in the storage and handling of crude rubber testified, 'I know that those things do not in themselves pay for handling the traffic. '"

"Generally speaking, the respondents' position with reference to storage of westbound crude rub-

* For further details as to rates, costs, etc., see R. 38-39, 102, 179-183, 185-188, 360-363.

ber," the Commission found, "is that by furnishing the storage some business is obtained for their lines which would otherwise not move thereover. While recognizing that the amounts received for the handling and storage do not equal the cost of those services, they attempt to justify the present practices by claiming the right to offset the storage, handling, and insurance losses against the line-haul revenue. Their position in this respect is directly contrary to the principles announced at page 201 [R. 111] of the prior report." (R. 132)

The Commission found, in connection with the Lehigh Valley, that on crude rubber stored in its warehouse at its Claremont terminal in Jersey City, for 20 months, the storage and handling costs exceed the divisions of the rates received. (R. 182)

" * * * an exhibit of record shows that, on crude rubber remaining in storage for a period of 20 months, the handling cost, and storage cost, which does not take into account any depreciation on the building, exceed the entire amount of revenue which the Lehigh Valley receives as its divisions for transporting crude rubber from shipside to the end of its line at Buffalo, N. Y. In other words, this means that on crude rubber unloaded from vessels and stored at Claremont for 20 months, reloaded, and hauled to Buffalo, *the actual monetary loss for the storage and handling is greater than the division received by the Lehigh Valley for the transportation of the goods.*" (R. 146)

The Commission further found that "A witness for the Baltimore & Ohio introduced an exhibit showing the net revenue per ton received on rubber transported by it during the period from July 1930 to April 1935. The exhibit does not take into account the cost for transporting the freight from New York to destination. It shows that on 148,129 tons of rubber not placed in storage but moved directly from shipside to destination, the Baltimore & Ohio's division of the line-haul revenue was \$5.29 per ton. It had left from its division received on 107,823 tons of rubber stored in New York \$2.84 per ton. The difference between these figures, \$2.45, represents a loss to the Baltimore & Ohio from storing and handling the goods, or expressed differently, cost incurred in performing commercial service on the rubber." (R. 182-193)

Under the carriers' tariffs rubber may be stored subject to the transit privilege for 2½ years. (R. 181, 352) The longer the storage period the greater the carriers' loss. (R. 187, 360) The B. & O.'s loss on rubber stored for one year in the American Dock or Pouch Terminal stores is \$4.53 per ton. The Commission found that the total expense to the B. & O. "in connection with the traffic handled into the warehouses, stored for one year, and handled outbound, amounts to \$7.06 per ton," while "the revenue collected for such service, including

* The aggregate loss on the 107,823 tons referred to, at \$2.45 per ton, amounted to \$264,166.35.

"inbound lighterage, amounts to \$2.53 per ton, resulting in a loss of \$4.53 per ton. Such loss is absorbed by the Baltimore & Ohio out of its line-haul revenues * * *." (R. 128)

The tariff rate on rubber from New York to Akron is \$8 per ton (R. 49). When the storage loss of \$4.53 is deducted from this line-haul rate, the amount left is \$3.47. Thus, the B. & O. actually transports the rubber from New York to Akron for \$3.47, instead of its published tariff rate of \$8. In other words, its tariff rate of \$8 is cut to \$3.47 by reason of its storing goods *for particular shippers* at below-cost rates in these warehouses.

"The desire of respondents to obtain traffic for their lines clearly results in concessions and departures from their published rates prohibited by the act," the Commission said. (R. 183)

The Commission found that "it is established that those persons who are able to avail themselves of storage and handling at the carriers' noncompensatory rates, and whose costs from shipside to destination are thereby reduced by the amount of the difference between compensatory rates and the non-compensatory rates, receive an undue and unreasonable preference or advantage over those persons whose commercial practices will not permit of their placing their goods in storage at New York, but require direct shipment from shipside to destination. Not only is the latter class of persons unduly or unreasonably prejudiced or disadvan-

taged, but such prejudice and disadvantage extends to all persons who are compelled to pay the carriers' transportation rates which are dissipated by their storage practices. The provisions of section 3 conflict with the asserted rights of the respondent carriers to deal in the storage of commodities which they transport, and in such dealing to sell their storage at a price less than the cost of that service." (R. 192).

In considering section 6 of the Act, the Commission said, "In the instant case, the carriers sell warehousing services at less than the cost of providing them and absorb the resulting loss in their transportation revenues. Through the publication of tariffs by which they hold themselves out to store and handle goods in their warehouses at noncompensatory rates, the carriers in effect reduce their line-haul rates from shipside to destination on traffic stored in their warehouses. The carriers assume a portion of the cost of commercial warehousing which should be borne by the shippers as a part of the expense incidental to the conduct of their business, and by this device work departures from their tariff rates, in violation of section 6 of the Interstate Commerce Act." (R. 192)

After considering the carriers' below-cost insurance rates and finding similar violations in connection therewith (R. 192-196), the Commission made the following "Summary of Principal Findings of Fact with Respect to so-called 'Storage-in-

Transit, and Services incidental Thereto" (R. 196-197):

1. Each of the seven class I respondent carriers considered herein provides by tariff publication for storage, handling, and with the exception of the Jersey Central, for insurance of carload freight in warehouses, buildings, or piers owned or controlled by it or by companies with which it is affiliated.

2. The storage, handling, and insurance arrangements provided under respondents' tariffs, considered in the discussion herein in connection with the storage of eastbound and westbound carload freight and insurance, are not services incidental to transportation, but are commercial services. Similar commercial services are performed by competing warehouse companies in the Port of New York district, which are not owned or controlled by, or affiliated with, respondents.

3. The tariffs providing said services are a part of a scheme devised to purchase competitive traffic, and through said tariffs the respondents hold themselves out to perform or furnish commercial services under the guise of transportation services.

4. The said tariffs are instruments which work violations of the act * * *. [The omission, as indicated by the asterisks, is of the words "and the services provided by such tariffs are not properly subjects of tariff publication", this part of the finding having been rescinded by the third report.]

5. The respondents deal in and furnish commercial storage, handling, and insurance of goods at rates and charges which do not reimburse them for the full cost of providing such services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods in their owned, controlled, or affiliated warehouse buildings or piers.

6. The respondents do not assume or bear any part of the cost of conducting the commercial operations of competing shippers who store goods in warehouses operated by said competing warehouse companies.

This was followed by the Commission's ultimate findings, which read (R. 197-198):

We find that, exclusive of storage and handling directly incident to immediate transportation or immediate delivery of goods, the storage, handling, and insurance of goods under tariff arrangements in warehouses or piers owned or controlled by, or affiliated with, respondent carriers, as described of record and discussed herein, are commercial services provided to certain shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost thereof.

We further find that the provision by respondents of said commercial storage, handling, and insurance at such noncompensatory rates and charges reduces below the published tariff rates the transportation

charges paid by certain shippers in interstate commerce, whose goods are so stored, handled and insured, and results in concessions to said shippers to the extent of the difference between the cost of said respondents of providing such storage, handling, and insurance, and the amount which they receive therefor.

We further find that through such storage, handling, and insurance arrangements, and by granting such concessions, the respondent carriers are guilty of unjust discrimination, in violation of section 2 of the Interstate Commerce Act, make and give undue and unreasonable preferences and advantages to certain shippers in interstate commerce, in violation of section 3 of said act, and depart from their published tariffs, in violation of section 6 of said act.

We are not to be understood as here condemning *bona fide* stoppage and storage in transit as permitted generally by carriers throughout the country, for the purpose of milling, manufacturing, or similarly trade processing the commodities stopped or stored.

We affirm our prior findings that the respondents' warehousing and storage practices, charges assessed therefor, allowances made in connection therewith, and the insurance of goods as hereinbefore described in the Port of New York district, dissipate respondents' funds and revenues, are not in conformity with efficient and economical management as contemplated by the Inter-

state Commerce Act, and are not in the public interest.

The order

After the issuance of the report on further hearing, the respondents petitioned the Commission to grant them a third hearing. This was denied but the Commission reopened the proceeding for oral argument and reconsideration. Oral argument was heard by the Commission November 23, 1936.

On February 2, 1937, the Commission issued its report on argument and reconsideration (220 I. C. C. 102), in which it affirmed the findings of the original report and the report on further hearing, except the finding in the latter report that services provided by respondents' so-called "storage-in-transit tariffs" are not proper subjects for tariff publication. Reversing that finding, the Commission held that the rates and charges for these services should be published in filed tariffs. (R. 269)

With this report the Commission made the order of February 2, 1937, which the petition herein seeks to enjoin.

The order requires the seven carriers, respondents in the Commission proceeding,

(a) To cease and desist from permitting shippers in interstate commerce over their lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by or affiliated with respondents in the

Port of New York District at rates and charges which fail to compensate them for the cost of providing said space,

(b) To cease and desist from storing goods shipped over their lines in interstate commerce or providing storage space to shippers in interstate commerce over their lines for commercial storage of goods, as fully defined in the Commission's reports, at rates and charges which fail to compensate them for the cost of storing such goods or providing such storage space,

(c) To cease and desist from directly or indirectly handling goods incident to commercial storage, as fully defined and described in said reports, at said warehouses, buildings or piers for shippers in interstate commerce at rates and charges which fail to compensate them for the cost of said handling,

(d) To cease and desist from insuring goods shipped over their lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York District for shippers in interstate commerce at less than the cost of providing such insurance,*

(e) To cease and desist from applying, by means of tariffs now on file with the Commission, noncom-

* This requirement of the order is not directed against the Jersey Central because the Commission found it does not provide such insurance.

pensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce, which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

The order contains a further provision addressed solely to the Jersey Central requiring it to cease and desist from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said carrier.

As issued, the order also required the Erie to cease and desist from subsidizing and granting concessions to the Seaboard Terminal & Refrigeration Company by means of excessive rentals paid for space leased from that company, but the Commission, by order dated April 9, 1937, rescinded this part of the order and reopened the proceeding insofar as it relates to this particular subject matter for further hearing. Therefore, the question of the validity of this requirement of the order is not in issue in this suit.

Findings of fact by court below

Although objecting to the form of appellees' proposed findings of fact (R. 328), appellants did not challenge their accuracy in any respect, and the court below adopted them. (R. 321) These find-

ings, 179 in number (R. 341-402), among other things, show the principal facts found in the Commission's reports.

After several findings as to procedural matters, findings 1 to 17 (R. 341-346), there are stated facts in regard to commercial warehousing in the New York district, findings 18 to 22 (R. 346-347), the general warehousing activities of the railroads, findings 23 to 41 (R. 347-352), the carriers' warehousing practices under the storage-in-transit privilege, findings 42 to 63 (R. 352-358), the rates and costs of storage and handling in connection with such storage-in-transit warehousing, findings 64 to 84 (R. 358-363), the costs and rates of insurance in connection with goods so stored, findings 85 to 99 (R. 363-367), followed by a statement of the Commission's conclusions in respect of the warehousing under the storage-in-transit privilege and the handling and insurance incidental thereto, findings 100, 101, 102 (R. 367-369).

Next is taken up the storage and warehousing practices of the carriers in connection with east-bound traffic, findings 103-117 (R. 369-374).

Finding No. 118 (R. 374) relates to the formula presented to the Commission for the ascertainment of warehousing costs and the rate per annum necessary to secure a fair return per square foot of warehouse space in the Port of New York district. (See first report, R. 41, under the heading "Basis of Computing Rental.")

Next is taken up the warehousing activities of the several railroads, other than storage, etc., under the transit privilege, as follows:

Baltimore & Ohio.....	Findings 119-128	R. 374-378
Lackawanna.....	" 129-149	378-387
Lehigh Valley.....	" 150-154	387-390
Jersey Central.....	" 155-158	390-393
New York Central.....	" 159-171	393-398
Pennsylvania.....	" 172-178	398-401

The Commission's findings in regard to excessive rentals paid by the Erie for space leased from the Seaboard Terminal & Refrigeration Company are omitted in view of the fact that the Commission rescinded this part of its order of February 2, 1937, and reopened the proceeding insofar as it relates to this particular subject matter for further hearing.

The last finding, No. 179 (R. 401-402), relates to the competitive waste resulting from the appellants' warehousing in the New York district.

The record

Appellants do not challenge the findings of either the Commission or the Court below as unsupported by evidence. For this reason it was not deemed necessary to print the evidence before the Commission, which is voluminous, consisting altogether of 3,972 pages of testimony and 302 documentary exhibits. (Findings Nos. 9 and 13, R. 344, 345.) A certified copy of this evidence was introduced in the Court below (finding No. 7, R. 343) and has been transmitted to this Court as an original exhibit, under order of the Court below (R. 423).

but was not designated for printing by either appellants or appellees (see R. 426, 427-428), it being appellees' understanding that this evidence is before the Court as an original exhibit under Rule 10 (4), and that, as such, it may be considered along with the transcript and may be referred to in brief and in oral argument by counsel for any party as though it were printed as part of the transcript.

In the few instances where the testimony before the Commission is referred to herein, the page number of the typewritten transcript is preceded by "Tr."

SUMMARY OF ARGUMENT

The Commission's findings establish that appellants in their own competition for line-haul traffic, cut warehousing storage, handling and insurance rates and space rentals below their own costs and below those of the competitive commercial warehousemen, without regard to "fair value." The Commission found that appellants' motive in engaging in the commercial warehouse business in the New York district is to induce shippers to use their rail facilities and thereby increase the volume of traffic over their respective lines. The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services. Appellants, having supplied

themselves with warehousing facilities for competitive reasons, sought out the larger shippers and offered them lower rates for warehousing services and warehouse space than the competitive private warehousemen. Competitive warehouse price cutting by appellants brought their rates down to a level below their own costs. Appellants were not concerned that their charges for warehousing services and space furnished were not compensatory because they expected and intended to recoup warehousing losses through revenue derived from rail transportation. Appellants can maintain below-cost warehousing rates because they can draw upon their line-haul revenues to make up the resulting losses, whereas the independent warehousemen, lacking such a revenue reservoir, cannot continue to rent space or store goods at below-cost charges.

Many findings in the Commission's reports upon specific instances show that competition among themselves for line-haul traffic was the only reason for appellants' low warehousing charges. This is true as to the warehousing conducted by appellants through their subsidiary warehouse companies and also as to the warehousing which they conduct directly in their own names of traffic stored under the storage-in-transit privilege as published in their tariffs. The Commission found that the tariffs offering those services "are a part of a scheme devised to purchase competitive traffic." Under the operation of the transit privilege the shipper ob-

tains a refund of the charges for the inbound movement to the warehouse if he ships the goods out over the same line, and therefore the carrier that succeeds in getting a particular lot of freight into its warehouse is practically certain to obtain the outbound rail haul. Each of the seven appellants granted this transit privilege, and each made the same extremely low storage, handling and insurance charges on goods stored in its warehouse subject to the transit privilege. These charges were below costs, and were maintained by appellants to meet each other's competition.

Appellants' contention that the only basic finding which the Commission made was that appellants' warehousing charges are below cost and that the Commission did not find that these charges were below fair value, is erroneous. Many findings in reference to appellants' commercial warehousing activities in general, together with numerous findings upon specific instances, as expressed in the reports, show definitely that appellants did not reduce their warehousing charges in order to meet a previously prevailing market price or to bring them down to what was regarded as fair value determined by some established standard or by going prices, but, on the contrary, that they cut their charges below those of the independent commercial warehousemen and below their own costs to whatever level was necessary to get the business, in their competition one with another, to obtain the line-

haul movement of the traffic, which usually was obtained by the railroad that secured the warehouse business; that appellants' motive in offering and granting these commercial warehousing services at abnormally low charges was the same as that which caused the three competing roads serving Philadelphia to pay the unwarranted allowances to certain warehouses there, condemned as rebates and as causing discrimination against competing, independent warehouses, in violation of sections 2 and 3, in *Warehouse Co. v. United States*, 283 U. S. 501; to gain traffic for their respective lines, lower rates for warehousing services and warehouse space than those offered by the competing independent warehouses here being the inducement offered to shippers to accomplish that purpose. "The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitability of the business." (Report, R. 106.)

Appellants have no legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect, as here, is to transport the property in interstate commerce at less than the published rates. None of the decisions cited by appellants establishes that they have such a right. On the contrary, the provisions of the Interstate Com-

merce Act, especially sections 2, 3, and 6, as interpreted by this Court in the *New Haven* case, *Warehouse Co. v. United States*, and other cases, deny the existence of such a right. Cf. *Wight v. United States*, 167 U. S. 512, *New York Central R. R. v. United States*, 212 U. S. 481, *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, *United States v. Union Stock Yard*, 226 U. S. 286, 301-309.

The sufficiency of the findings is to be determined in the light of the facts and circumstances in each case, and nothing unreasonable in this regard is required. *Florida v. United States*, 292 U. S. 1, 9, *United States v. Baltimore & Ohio R. R.*, 293 U. S. 454, 462-465, *United States v. Louisiana*, 290 U. S. 70, 75-82. In the case at bar, the findings are adequate and fully support the Commission's order.

The order, prescribing costs as the minimum, to correct violations of sections 2, 3 and 6 of the Act, is fully supported by the decision in the *New Haven* case, 200 U. S. 361, in which this Court established the salutary principle, as necessary to give vitality to the provisions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates, that a carrier may not engage in a trade activity beyond its common-carrier duties and contract to sell a commodity at a price insufficient to pay the cost of the commodity and the published freight rates for its transportation. There the C. & O. sold coal to the New Haven at a delivered price of \$2.75 per ton. The cost to

the C. & O. of the coal and the ocean transportation aggregated \$2.47 per ton, leaving the C. & O. only about 28 cents a ton for the rail carriage of the coal over its own line, whereas its published tariff rate was \$1.45 per ton. This Court held that the C. & O. thereby transported the coal at less than its tariff rate, in violation of section 6 and discriminated against other shippers over its line, in violation of sections 2 and 3. The Commission found that the situation here disclosed is analogous to that considered in the *New Haven* case. The court below concluded that, in giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, it can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both, at rates less than those of the published tariffs plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation, that in the present instance commercial warehousing, storage and insurance were sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned.

The below-cost warehousing rates of appellants dissipate their revenues, cause unjust discrimination against particular shippers and against the general body of shippers over their lines, in viola-

tion of sections 2, 3 and 6 and of the purpose of the Act as expressed in section 15a to maintain adequate national railway service. *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, *New England Divisions Case*, 261 U. S. 184, 189-190, *Dayton-Goose Creek Ry v. U. S.*, 263 U. S. 456, 478, *R. R. Comm. v. Southern Pac. Co.*, 264 U. S. 331, 341, 347, *United States v. Louisiana*, 290 U. S. 70, *Florida v. United States*, 292 U. S. 1, 7-8.

The serious losses resulting from the appellants' warehousing practices at New York, and the competitive waste, found in the Commission's first report, continued thereafter, as shown by the second report. There are several clear indications that unless the appellants' warehousing practices at New York are corrected similar practices will spring up elsewhere throughout the country. Competitive waste is of national concern, *Texas & Pacific Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277-278, *Colorado v. United States*, 271 U. S. 153, 163. It is the primary aim of the policy of the Act as amended to secure the avoidance of waste. *Texas v. United States*, 292 U. S. 522, 530.

The Commission, though holding in its third report that tariffs publishing the storage rates and the handling and insurance charges on freight stored under the transit privilege should be filed, affirmed its prior finding that the services under these rates and charges are not transportation services. The Commission expressly made the de-

termination that these services are not within the carriers' transportation duties—such a determination as this Court held in *U. S. v. Am. Tin Plate Co.*, 301 U. S. 402, 408, it has authority to make. Its simultaneous ruling that tariffs covering these services should be filed (obviously for policing purposes) is not tantamount to an opposite determination, as appellants suggest.

The fact that appellants' below-cost charges for commercial storage, handling and insurance were published in appellants' tariffs did not prevent them from causing the discriminations and other violations found by the Commission. *I. C. C. v. B. & O. R. R.*, 225 U. S. 326, 345, *Warehouse Co. v. U. S.*, 283 U. S. 501, 511, *U. S. v. Am. Tin Plate Co.*, *supra*, pages 406-407. Whether the charges were published or not, they cover commercial services, and the fact that they were below-cost, coupled with the fact that they were held out as an inducement to attract the movement of competitive traffic over appellants' respective rail lines, with the result that the aggregate charge was not sufficient to pay the cost of furnishing the commercial warehousing services and the appellants' published line-haul rates, was the essential basis for the finding of their unlawfulness. The Commission's order does not require that appellants' commercial services under these tariffs shall be continued, nor that they be discontinued. It does require, if the services are continued, that the charges be brought up to at least

a compensatory basis, and that tariffs covering them be filed with the Commission.

The order for the future rightly corrects the discriminations and other violations of the Act by requiring removal of the means by which they were accomplished. Under section 15 (1) the Commission is authorized, whenever it finds after full hearing that any practice is violative of any provision of the Act, to make an order that the carriers "shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist." Here, the Commission finds that violations exist to the extent that appellants' warehousing charges are below cost. To correct these violations its order requires that appellants shall cease and desist from furnishing the warehousing services, etc., to interstate shippers over their respective lines, at below-cost charges. This Court in sustaining the Commission's order involved in *Warehouse Co. v. United States*, requiring the carriers to cease paying the discriminatory allowances, said the Commission "rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished." (283 U. S., page 513) Cf. *U. S. v. Am. Tin Plate Co.*, 301 U. S. 402, 408.

The order, read in the light of the reports as a whole, obviously requires that the appellants shall determine the costs of storage and space rental per square foot and charge prices no lower. The ex-

tent of occupancy of a warehouse at a particular time will not affect this cost on a square foot basis. If appellants are in doubt as to any matter concerning the ascertainment of the costs, their proper procedure is to make application to the Commission for further specifications. *American Exp. Co. v. Caldwell*, 244 U. S. 617, 627, *A. T. & T. Co. v. U. S.*, 299 U. S. 232, 245, 246, 247.

The order is a valid exercise of the Commission's regulatory power and therefore does not deprive appellants of their liberty or property in contravention of the Fifth Amendment.

ARGUMENT

I.

The Commission's findings establish that appellants in their own competition for line-haul traffic cut warehousing charges and space rentals below their own costs and below those of the competitive commercial warehousemen, without regard to "fair value"

Appellants say at page 7 of their brief that their "position on this appeal is that the findings made by the Commission, taken at their full face value, are insufficient in law to sustain the order. Appellants' assignments of error are all to this effect (R. 407)."

The substance of their argument is as follows. The only "basic" finding made by the Commission is that they make warehouse leases and render warehouse services for shippers at less than cost and that thereby they are guilty of making con-

cessions from their published line-haul transportation rates in favor of such shippers, in violation of section 6 (7) of the Interstate Commerce Act; that such a "bare" finding is insufficient because, even if warehouse leases are made and warehouse services are rendered at less than cost, the difference between the cost and the lower rate or rent cannot legally be a concession unless it is also found that the space rentals and storage rates are below fair value, as measured by the prevailing market and other relevant facts; that the Commission did not find that the warehouse rentals or charges collected by appellants are less than the fair and reasonable value, and hence there are no concessions and there are no violations of sections 2 and 3 of the Act because the only discriminations and prejudice found are those "flowing from the asserted concessions, or section 6 violations." (Brief, pp. 12, 14, 19, 35, 37.)

The principal unsoundness in the argument is that it does not consider the real situation, as disclosed in the Commission's reports, and puts out of view many important, underlying findings which give full support to the Commission's order. It assumes, contrary to the Commission's finding, that when appellants entered into the commercial warehouse business in the Port of New York district, they merely made rates to meet the prevailing rates of the independent commercial warehousemen at that time, and have continued their rates on that basis, whereas the Commission finds that in their

own internecine competition they cut warehouse rates and rents not only below their own costs but also below the prevailing rates—that they made whatever rates would get the business in their own competition one with another. It further assumes that the rates generally prevailing in the New York district are below costs, that is, that both the carriers' and the independent commercial warehousemen's rates are below costs, whereas the Commission's findings show that only the carriers' rates are below costs, that they can maintain below-cost warehouse rates because they can draw upon their line-haul revenues to make up the resulting losses, whereas the independent warehousemen, lacking such a revenue reservoir, cannot continue to rent space or store goods at below-cost charges. It asserts that the only finding made by the Commission is that appellants make leases and render services at less than cost, whereas the Commission's findings were far more comprehensive than this. The argument is without merit for the further reason that it asserts the right on the part of appellants to deal in commercial warehousing, beyond their common-carrier duty, to make below-cost warehousing charges for the purpose of inducing the movement of competitive traffic over their respective lines, to draw upon and reduce their line-haul transportation rates in order to recoup the warehousing losses, and thus in effect to transport such traffic at less than the published rates and to discriminate against other shippers,—a right simi-

lar in principle to that denied in the *New Haven* case and other decisions of this Court.

The motive of the carriers in engaging in the commercial warehouse business in the New York District is of primary significance. That motive, the Commission found, "is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines." (R. 105) "The aggregate of the charges for transportation and warehousing or storage influences shippers to route their freight via the railroad and through the warehouse that exacts the lowest aggregate charge for the two services." (R. 36) "The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement," but "those engaged solely in the warehousing business must depend entirely upon that business for revenue and profit." (R. 105) They cannot maintain rates below costs. "Obviously," the Commission said, "no independent warehouse could continue to sublease space or store goods at charges below cost." (R. 138)

Moreover, the carriers could not dictate the rates of independent warehousemen. To serve their competitive purposes it was necessary for the carriers to have their own warehouse facilities. They supplied themselves with these facilities by a variety of arrangements and the result was always the same, the Commission found, "namely, the possession and control of warehouse facilities available to serve whatever *competitive* purposes railroad management may have in mind."

They use these warehouse facilities as competitive weapons. Either directly or through their dominated and controlled subsidiaries they "*seek out the larger shippers and offer them lower rates for warehousing services and warehouse space than the private warehousemen.*" (R. 105)

They are little concerned that their charges for the warehousing services and space furnished are not compensatory, "*because they expect to recoup any losses through revenue derived from rail transportation.*" (R. 105)

Wholly incompatible with the intimation in appellants' brief that they merely meet the prevailing market rates is the finding:

The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitability of the business. (R. 106).

The inducements, among others, were those previously referred to in the report, namely, lower rates for warehousing services and warehouse space than those offered by the private warehousemen.

Again, in the following language, the Commission found that the carriers' warehousing charges were lower than those prevailing at private warehouses (R. 106):

The conflict of interest applies also as between larger shippers, controlling sufficient

traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities *at higher rates than are charged by the carrier-controlled warehouses.*

"In addition to furnishing warehousing services the rail carriers, or their subsidiaries," the Commission found, "also rent space in stations, piers, or warehouse buildings, to certain shippers for various purposes, *and the rental exacted is not only below the prevailing rates but is noncompensatory.*" (R. 107)

It is apparent upon the face of the Commission's reports that appellants made no attempt to justify their below-cost warehousing charges on the ground that their costs are higher than those of the competing independent warehousemen, and that for this reason they had to cut their charges below costs in order to meet the rates of the independent warehousemen. In the absence of such a contention the Commission would be fully justified in concluding that warehousing charges commensurate with "fair value" would be at least up to the level of costs. The Commission's findings give ample expression to the fact that appellants' below-cost warehousing charges are below "fair value" and benefited the shippers at least in the amount of the difference between the carriers' costs and their lower charges.

For example, in reference to the warehousing activities of the B. & O. as carried on through its subsidiary, the B. & O. Stores, the Commission said that the B. & O., "by bearing the losses of the stores company, provides the concession, which consists of the difference between the transportation rate plus the *real value* of the storage or use of the rented space and the rate at which these are actually furnished." (R. 135) This immediately followed the finding:

The record establishes beyond question that the Baltimore & Ohio's traffic department dictated many rates which, when applied by the stores company, resulted in the rental of space and storage of goods at prices which, while they obtained line-haul business for the Baltimore & Ohio, were less than the cost of providing the space or services. In other words, the shipper in those instances obtained a concession in storage which affected and reduced the total cost for transportation and storage of the commodities shipped. The effect of such practices upon persons operating competing warehouses has been previously discussed. (R. 134)

In its ultimate conclusions as expressed in its first report, affirmed in its second report, after finding violations of section 2, the Commission found:

It is likewise clear that the shippers *receiving the benefit* of such noncompensatory charges are given undue preference or advantage in violation of section 3 (1) of the

act, over shippers who have no need of warehousing or storage, or others who for various reasons are compelled to pay the line-haul rate *undiminished by any such benefits.* (R. 109)

Many other findings appearing in various parts of the reports show the benefits to the shippers and show, as a matter of fact, that the carriers' below-cost warehousing charges were of distinct value to them. In a number of instances, too, the Commission found that the carriers made unwarranted allowances to particular warehousemen, under facts and circumstances similar to those in *Warehouse Co. v. United States*, 283 U. S. 501. (See, e. g., R. 79, 108, 168, 169-170, 176)

Further, it is obvious that there would be no inducement to a shipper to route his traffic over a particular railroad and through the warehouse of that railroad unless the warehousing charges of the railroad warehouse were lower than those of competing warehouses. The Commission's reports find as a fact that there were such inducements; that the purpose of the appellants in entering the commercial warehouse business was to increase the volume of traffic over their respective lines by means of lower warehousing rates than the shippers could get at the warehouses of the independent warehousemen. The Erie was the first in obtaining a large new warehouse located upon its rails and served exclusively by it. The Commission, after noting absence of evidence that the Erie or the

Seaboard own any stock of each other, found that "the relations between the two companies were very close as shown by the leasing arrangements, and the evidence shows that the president and other officers of the Erie were greatly interested in the selection of officers of the Seaboard Company *and the tonnage it might bring to the Erie.*" (R. 91) And the Commission found:

Such an arrangement between the Erie and the Seaboard companies could and doubtless would seriously affect any independent warehouse company operating in competition with them. Evidence shows that storage has been obtained in the Seaboard warehouse at rates far below rates previously paid elsewhere by the owners of the commodities stored. (R. 91.)

To match this arrangement the other New York carriers, competitors of the Erie, arranged for the construction of large new warehouses on their lines, to the end that the aggregate of the line-haul transportation charge and the warehousing charges via their lines would be no higher than via the Erie. The result, the Commission found, whether or not initial advantages may have been realized at one time or another by individual carriers; "is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public." (R. 113)

But, the independent competing warehousemen could not meet the below-cost warehousing rates of

the railroads, since they have no line-haul transportation revenue to draw upon to make up their warehousing losses.

Competition among themselves for line-haul traffic was the only reason for appellants' low warehousing charges.

The competitive situation is accurately reflected by the Commission's findings regarding the operations of the B. & O. Stores. This company conducts a general warehousing and storage business in the B. & O.'s nine-story warehouse building at 26th St. and 11th Ave., New York City (R. 128), and also on the second floor of the B. & O.'s Pier 21, East River, the latter known as East River Stores. (R. 42-43, 128)

Although separately incorporated, the Stores Company "is responsive to, and under the direction and control of, the Baltimore & Ohio. * * * It is an adjunct of the railroad's traffic department."

(R. 128) For a number of years after the incorporation of the Stores Company in 1914, its operating practices, "*while conducted with a view to attracting traffic to the Baltimore & Ohio,*" did not differ materially from the practices of warehouse operators in general in the Port of New York district. As then conducted they seem to have resulted in some profit, and apparently the operations would have remained profitable had these practices been continued. But upon the entrance of other carriers into the commercial warehouse

field in the Port of New York district on a larger scale than those of the Stores Company, competition for commercial warehouse business became increasingly bitter. "*After that time the traffic department of the Baltimore & Ohio dominated the management of the Stores Company.*" (R. 129)

"With few exceptions," the Commission found, "freight taken into storage by B. & O. Stores has been restricted to that on which the carrier would get the line haul. * * * the warehouse has been operated for the purpose of securing traffic to move via the B. & O., and that its patrons have been those who receive, or propose to ship, freight over the carrier's lines." (R. 45)

"Exhibits of record, particularly letters found in the files of the Baltimore & Ohio, show the struggle of the management of the Stores Company to continue to operate the warehouse at rates which would permit it to carry its own burden, *but that the desire of the traffic department to secure business for the Baltimore & Ohio resulted in the forcing of warehouse rates and charges to unprofitable levels, leaving the Baltimore & Ohio to assume the burden of the warehouse operations.*" (R. 129-130)¹⁰

In one of these letters, written in November, 1929, the manager of the Stores Company, in full charge

¹⁰ Copies of these letters, obtained by authorized agents of the Commission, who have access to the carriers' files under section 20 (5) of the Act, were obtained and by them introduced as evidence at the hearings. (See R. 31)

of the operations of the warehouse, stated that there had been plenty of business right along, "*yet we have lost money for the past three years due to the fact that the trunk lines here have engaged in a foolish war among themselves, which has greatly interfered with our business.*" (R. 131)

After the Lackawanna had built its large warehouse in Jersey City in 1930 (Lackawanna Terminal Warehouse), it made an attempt to get a shipper, the National Cash Register Company, then a tenant of the B. & O. Stores Company, to move into its new building, offering it a lower rental than the B. & O. made. In order to retain this tenant the Stores Company was obliged to make a reduction in its rent of 23 percent. (R. 132)

Speaking of the same tenant, the Stores manager admitted that in the beginning he "had agreed to give him two (2) locations adjacent to the elevator on the platform free of charge to enable him to make separations and to assemble goods for immediate export or local delivery. As time went on, they considerably exceeded this limit and occupied for the most part four (4) bays of our most precious space, and there have been times when they have exceeded this. They are the only tenant in the house that enjoys this privilege." (R. 132)

In June 1930 the manager of the Stores Company advised its president:

I have been trying for some time to get the business of the General Motors Radio

Corporation, which originates in Dayton and at present is stored at the Bush Terminal. I was informed that they were going to change and that the D. L. & W. people had solicited them strongly, stating that they did not aim to make any profit on their storage business, *and, in fact, the rates they quoted would net them a large loss.* This is one very truthful statement. I quoted him our rates, which he said were higher than the D. L. & W.'s, although I had cut them as far as seemed prudent. Their Agent said the D. L. & W. rates were better * * *

We have published no tariff since 1921. This was a very carefully prepared one with the rates figured out to give the same yield per square foot on all commodities alike and based on a gross earning capacity of $7\frac{1}{2}\text{¢}$ per square foot. We have a number of copies left, but I keep them closely filed in a drawer and do not give them out to the public, for the reason that it gives our competitors a target to shoot at. Whenever possible, I try to obtain these rates, but under present conditions we have not been able to do so *and our statements show that we are carrying on our business at a loss, whereas the volume of it is sufficient to yield a fair profit.* I handed copies of this tariff as affording a safe guide for rate making purposes to Mr. Nat Duke, Vice President of the D. L. & W. (R. 132-133)

In December 1930 the Stores manager advised its president that their revenues had shown a con-

siderable reduction. "This is due to the low rates at which we are forced to handle goods, for in many instances these rates have been dictated to us by Mr. Richardson's office. [Mr. Richardson was then Freight Traffic Manager of the B. & O., R. 132.] By charging at the usual rates, the amount of business we are receiving this fall would ordinarily have netted us a fair profit on our operations, but we have been asked and have had to accept several accounts at rates that bring us out with a considerable loss." The only thing, he said, he "ever refused absolutely to take in was the automobiles they tried to get us to accept more than a year ago at ruinous rates. If we had met the figures that were being charged by several railroads in this city, it would have meant handling the automobiles for about 25% of our usual rates, for which we could not possibly attempt to handle business without losing heavily." (R. 133)

In a letter written on January 10, 1929, the Stores manager stated "These abuses have grown greater year by year and are of benefit to nobody, *except to a very limited line of shippers, and the losses sustained thereby have to be borne by the balance of the shipping public.*" He then pointed out (what the Commission well understands) that the "traffic man"—men in the traffic department whose duty, among other things, is to solicit traffic—"knows nothing of the costs or responsibilities of performing services, and usually cares less. His

only thought is of tonnage, irrespective of whether it is going to yield a profit or a loss. One line puts an abuse into effect, and within a month all its competitors do the same. There is a gradual wiping away of railway net earnings, not alone due to inadequate rates, but to needless losses running into millions monthly that the traffic men initiate and maintain." (R. 46)

"As to the new warehouse projects now building or under contemplation on the Jersey side by the Erie, D. L. & W. and Penn.", the manager stated, "I think we can cross these bridges when we come to them. *If we anticipate by reducing our rates to a losing proposition, they will make theirs that much lower.*" (R. 46)

The Commission made the following findings:

"As indicated by the above and other correspondence not here quoted, but of record, the stores company's warehousing revenues were shrunk by competitive price cutting. The operations became unprofitable and in numerous cases accounts for storage and leased space were taken at rates below the cost of the services." (R. 134)

"This correspondence also indicates that the traffic department of the B. & O. was continually pressing the B. & O. Stores to reduce its storage rates *for traffic reasons*, and in numerous cases it appears such rates were actually dictated by that department." (R. 46)

"At East River Stores, goods were apparently taken into storage at what could be obtained for

the service; 'in other words, the rates not being based on anything but what could get the business.' " (R. 46)

"The correspondence shows also that the manager of the B. & O. Stores on numerous occasions called the attention of officials of the B. & O. to the losses that would be incurred in the operation of storage facilities, and to the performance of services free, or at rates below the cost thereof, upon demands of traffic officials in order to meet the competition of other carriers." (R. 46)

Aside from "fair value," discussed in the abstract in appellants' brief, the above evidence, which appellants could not contradict, discloses instances—and many similar instances are shown in the Commission's reports—of concessions similar to and as indisputable as that condemned by this Court in *United States v. Union Stock Yards*, 226 U. S. 286, in which, speaking of a bonus of \$50,000 which the carrier agreed to pay to Phaelzer & Sons, shippers over its line, in order to retain their traffic, the Court said:

Any other company with which it [the carrier] has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to

and an unlawful discrimination practiced in favor of Phaelzer & Sons. * * *. It is the object of the Interstate Commerce law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. (*Ibid.*, 308-309)

Many other findings in the Commission's reports upon specific instances further show the competitive situation. Without detailing the facts, which are shown in the Commission's reports, a few of these findings are here quoted.

"The record shows that the railroad's [Lackawanna's] purpose in constructing a warehouse operated through the warehouse company was to attract traffic to its line in competition with the other trunk lines, and that the incorporation of the warehouse company was in furtherance of that purpose and devised in an attempt to evade certain regulations to which the Lackawanna as a common carrier by rail was and is subject." (R. 136-137)

"The Kraft company through its control of a large volume of traffic, has, since January 1929, been able at all times to obtain space for its operations at rates which are wholly noncompensatory to the railroads' warehouse companies. The granting of concessions by carriers through the leasing of space at rentals less than its fair value is as un-

lawful as any other form of rebating. *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849; *Central of Georgia Ry. v. Blount*, 238 Fed. 292." (R. 141)

"Intensive traffic solicitation is conducted by the Lehigh Valley traffic and other departments to obtain business for tenants who occupy space in the building in order that the Lehigh Valley may benefit by the movement of traffic over its line." (R. 149)

"It was the original intent that the operation of the Starrett Lehigh and Bronx Lehigh buildings would attract traffic to the Lehigh Valley, and the intention is carried out at present. The failure to collect rentals from persons who use the Lehigh Valley in transporting their shipments results in the same situation as to both the shipper and the Lehigh Valley as the failure to exact compensatory rentals." (R. 152)

"The Newark warehouse was constructed and financed by the Jersey Central as a medium through which traffic would be attracted to its line. Traffic solicitation and advertising for the warehouse company emanate from the freight-traffic department of the Jersey Central in connection with the railroad's traffic information." (R. 155)

"The record is conclusive, however, that the [Newark] warehouse is an adjunct of the railroad's traffic department, and that the latter has made

continuous and intensive efforts to solicit traffic over its line for storage in the warehouse." (R. 155)"

"In their brief, page 4, appellants say, respecting the Commission's findings as to leases, that those made with respect to the Jersey Central are representative of all the others, and they thereupon quote (page 5) three of the five paragraphs of the Commission's "Summary of Principal Findings of Fact" in regard to the Jersey Central's lease of its Newark warehouse. Even the full summary does not restate all the important findings made in regard to this lease. See first report (R. 53-54) and second report (R. 154-159). These findings show that the Jersey Central leased this building, constructed at a cost of over a million dollars (R. 155) to the Newark Central Warehouse Company, a shipper in interstate commerce over the lines of the Jersey Central (R. 157, 158, 160), at a rental of only \$5,000 a year plus percentages of the profits, if any (R. 156), that the actual amount of the rental during the first year of the occupancy was \$17,217, slightly less than one-half of the taxes paid by the Jersey Central on the building for that period, which were approximately \$35,000 annually (R. 157), that the warehouse company obtained storage business by offering storage rates and handling charges averaging 48 and 63 percent, respectively, below the storage rates and handling charges of a competing warehouse in Newark (R. 158). This leasing arrangement is evidently a competitive measure, for it is obvious that the Jersey Central could not obtain competitive line-haul transportation if the warehousing costs when the traffic was shipped over its line were less favorable than over competing lines.

The Commission found *inter alia* that:

"Through this leasing arrangement, the Jersey Central, through its subsidiary warehouse company, subsidizes the Central Warehouse Company and places it, a 'person' within the meaning of that word as used in sections 2 and 3 of the Act, in a position of superiority over other such per-

"A large tonnage of flour is received by rail at the Port of New York, and is there held for distribution throughout the thickly populated surrounding sections. Storage of such flour is therefore a commercial necessity, and a large reserve supply must be at all times available. Flour is desirable traffic from the respondents' standpoint, and there is intense competition between them for its transportation. Under such circumstances the dealers and persons interested in the handling of flour have been, and are, able to secure concessions for storage, which reduce, and in some cases nullify, their cost for that trade necessity, and the respondent carriers have willingly or unwillingly assumed the burden of the storage expense." (R. 176)

"It appears clear that the interest of the Pennsylvania in the warehousing and storage facilities [of its subsidiary the General Cold Storage Company] was to meet the storage rates of its competitors." (R. 70)

sons engaging in the warehouse business and thus permits it to underbid such other competing persons for storage of shipments transported in interstate commerce. . . .

"Subsidies in the form of noncompensatory rentals for space occupied are the equivalent of allowances paid in money and in either case if paid for services not a part of a carrier's obligations are unlawful concessions. As also clearly indicated in *Merchants Warehouse Co. v. United States*, *supra*, a further violation of the Act results from the unjust discrimination and undue prejudice against persons operating warehouses in competition with the persons operating the warehouses which receive such concessions." (R. 158-159.)

"* * * the construction of this warehouse [Lackawanna Terminal] is a railroad venture, designed to compete with the other trunk lines, and to attract traffic to the Lackawanna, * * *." (R. 74)

"In 1930 the Lackawanna began negotiations to rent space on this pier to the Quaker Oats Company in an effort to draw traffic, which at that time was moving over the Jersey Central, to its line. The Oats Company did not consider the location on Pier 41 desirable and could not be induced to move except by the offer of an extremely low rental and the making of extensive alterations which it considered necessary to meet its purposes." (R. 76)

"Without reviewing in detail the discussion of the arrangements between the New York Central and the Auto Storage and Mellish companies, as set forth in the prior report, it should be recalled that the purpose of the New York Central in entering into the arrangements was to increase traffic over its line. The New York Central recognized that losses would thereby result, and intended to absorb such losses in the line-haul revenue on traffic which it hoped would be increased through traffic solicitations of the Auto Storage and Mellish companies." (R. 168)

"The need for this building [New York Central Kingsbridge Warehouse in which space is leased to the Auto Storage Co.] from a standpoint of retaining and securing carload traffic was explained

to the President of the carrier by one of the Vice Presidents in a letter of January 21, 1929, when, speaking of the competitive situation, he said: "This situation has not been serious from a traffic standpoint until recently when the Lehigh Valley, Erie and DL&W railroads have been active in soliciting this character of traffic. Each of these three lines has constructed a number of unloading tracks and platforms and at the present time the Lehigh Valley is constructing a large warehouse for storage purposes. There are a number of warehouses available for storage in the vicinity of the Erie Terminal and the DL&W has announced its plan to construct a warehouse for the storage of automobiles. In view of these activities we deem it necessary, in order to protect the traffic we are now enjoying, and to be in a position to obtain additional traffic, to provide adequate unloading facilities and warehouse storage at Kingsbridge." "12 (R. 77)

¹² The Commission's reports make it clear that the New York Central constructed this warehouse, at large expense, to meet the competition of other lines for the line-haul automobile traffic, and immediately leased space in the warehouse at a rental which its own estimates showed was below cost, to a storage concern of its own selection, and further made allowances to this concern for unloading carload traffic, and a part of the consideration was the storage company's agreement to solicit traffic for the New York Central. The Commission said: "It has been shown that the New York Central expected to incur a loss from the storage operations, but it was felt that this loss would be justified by the increased traffic. The prospective loss from the opera-

"Notwithstanding the fact that many of the losses shown herein had occurred before 1930, the Erie in order to obtain traffic for its line, was then considering and planning for additional storage space during the next five years. It felt that the need for such facilities would increase and that by securing space industries would locate thereon that would favor the Erie with traffic. As one official stated the proposition, 'Our traffic is going to be influenced by the facilities available. The fact that railroads are now increasing the storage time on some traffic indicates a longer time for the railroad to assume the burden.' Further, it was pointed out that Erie competitors were either building or had just completed extensive warehouse facilities, and it felt that it had to do likewise in order to hold and obtain its share of the traffic." (R. 96)

Storage under transit privilege

In its summary of principal findings with respect to so-called storage in transit the Commission found that the tariffs offering these services "are a part of a scheme devised to purchase competitive traffic." (R. 196) The operation of the tariffs publishing the transit privilege illustrates this.

tions of the building was intended to be covered out of the line-haul revenue." (R. 80) Thus this arrangement is within the condemnation of three decisions of this Court, the *New Haven* case, *supra*, the *Sheldon* case (*Lehigh Valley R. Co. v. U. S.*), 243 U. S. 444, and *Warehouse Co. v. U. S.*, 283 U. S. 501.

For example, crude rubber in carload lots, moved by the B. & O. from shipside in New York Harbor to a warehouse in the Port District for storage, is charged at an inbound local rate of 14 cents per 100 pounds. If subsequently reshipped *over the B. & O.* to Akron, Ohio (a typical destination), a rate of 40 cents per 100 pounds is collected, and, since that rate is applicable from the shipside as well as from the warehouse, the local inbound rate of 14 cents is refunded, resulting in the application of a net through rate of 40 cents. If the outbound shipment is made after the expiration of the designated time limit *or is forwarded over the line of a carrier other than the inbound rail carrier*, the inbound and outbound movements are treated as local shipments and the separate rates to and from the warehouse are applied, resulting, in the case of crude rubber to Akron, Ohio, in rates of 14 cents to the warehouse and 40 cents from the warehouse, or a total of 54 cents. (R. 353)

Under this arrangement, it is obvious that if a carrier succeeds in getting a particular lot of freight into its warehouse, it is practically certain to obtain the outbound rail haul, since the shipper thereby obtains a refund of 14 cents per 100 pounds.¹¹

¹¹ As frankly stated by the Freight Traffic Manager of the B. & O., that carrier figures that so long as the shipper has 14 cents per 100 pounds coming to him if he ships the freight out over the B. & O., it has the traffic "hog-tied" to its line. (Tr. 2788)

Each of the seven appellants granted this transit privilege, and each made the same extremely low storage, handling and insurance charges on goods stored in its warehouse subject to the transit privilege. Each carrier was forced to make the same below-cost storage, handling and insurance charges as the others, to the end that the aggregate of the warehousing and line-haul transportation charges over its line would not be higher than over the competing lines.

The B. & O., to meet the competition of the other lines, leased space in the warehouses of the American Dock Stores and Pouch Terminal Stores on Staten Island, for storage of this westbound freight. The carrier knew that this arrangement would result in heavy losses to it but felt it was necessary to maintain its "position among the other lines and obtain satisfactory results from a solicitation and traffic producing standpoint." (R. 48).

Officials of the B. & O. investigated the costs in advance and estimated the ensuing losses. These estimates, the Commission found, "indicate that *practically the entire revenue from the line haul [on rubber from New York to Akron, Ohio] would be dissipated in terminal operations [in New York], due principally to storage and labor incident thereto.*" (R. 49)"

"The General Freight Traffic Manager of the B. & O. testified at length regarding this arrangement. (Tr. 2764-2846) On cross-examination he expressly admitted what was already apparent from his direct testimony, namely,

The storage-in-transit privilege is applicable at the warehouses of the American Dock and Pouch Terminal stores, in space of the warehouse company other than that leased by the B. & O., so that whether or not the storage itself is conducted by the railroad company or by the independent warehouse company, the privilege is the same and the through rate is applicable in the same manner. (R. 38, 355-356, cf. Tr. 2795-96) The storage and handling rates of the warehouse company are, however, much higher than those of the railroad. (Tr. 3904) The railroad was forced to rent the space so that it could perform the storage at the same below-cost rates of the other railroads, in order to meet their competition.

"It is established beyond doubt," the Commission found, "~~that~~ each of the respondent carriers, *in attempting to stimulate traffic for its line*, under the guise of storage-in-transit tariffs, provides commercial storage and handling to certain persons for less than the cost of those services. The respondents thus reduce the transportation rates to such persons to the extent of the difference between the sale prices of the storage and handling and the cost thereof." (R. 191)

that the competition of the other New York railroads forced the B. & O. into the leasing of space in the American Dock Stores and Pouch Terminal Stores. "We could not," he testified, "sit idly by and see our competitors take the cream of our traffic away from us, and we were forced to adopt some expedient to meet this situation," (Tr. 2774)

"We are not to be understood as condemning bona fide transit arrangements, but only the practices here considered by which the carriers, *through stress of competition*, have assumed by tariff publication a part of the costs of strictly commercial storage and handling of goods." (R. 190)

Handling

The same competitive reason accounted for appellants' below-cost handling charges. It has been previously mentioned that the appellants' average handling cost, according to their own computation, is 44 cents per ton, whereas their uniform charge to the shippers on crude rubber and wood pulp (the two principal commodities stored by them under the so-called westbound storage-in-transit privilege, (R. 180, 187) is 20 cents a ton—less than half the cost.

It should be noted that several of the appellants employ stevedores to perform this handling. This is true of the Lackawanna, the Lehigh Valley and the Pennsylvania. The rate paid by the Lackawanna for handling at its Hoboken and Jersey City piers, which is done by contract labor, is 35.9 cents per ton. The Lehigh Valley pays the stevedores employed to perform all handling at its Claremont terminal in Jersey City 34.5 cents per ton. The contract rate paid by the Pennsylvania for handling at its Greenville pier and Piers K and L, at Jersey City, is 40 cents per ton. (R. 359)

The Lackawanna uses space in its Jersey City warehouse (Lackawanna Terminal Warehouse) for storage under the transit privilege. "The freight is ordinarily picked up at points in New York Harbor, either at docks or from steamships, and is frequently held at the warehouse for a year or more, and later forwarded to its destination. All handling of freight at this warehouse is done by the warehouse forces and charged to the railroad. Under its published tariff the railroad charges 20 cents per ton for handling the freight into and out of storage, but pays the warehouse 58 cents per ton, or a total of \$1.16 per ton for two handlings to perform the service, and absorbs the difference of 96 cents per ton." (First report, R. 74-75, cf. second report, R. 136.)

In each of the above instances, it will be noted, the rate paid by the carrier is substantially higher than the rate it charges the shipper; and the carriers' cost is definite. (See court findings 64-69, R. 358-359.)

Insurance

The same competitive motive accounts for appellants' below-cost insurance charges. A word of explanation as to this insurance is necessary. The liability of a carrier engaged in commercial storage is of course not that of common carrier but of warehouseman only, and as such warehouseman the carrier would be liable only in case of negligence. Where an owner of goods stores them in a commer-

cial warehouse he must make his own arrangements for fire insurance and normally he must pay the regular premiums of the insurance company. Appellants, except the Jersey Central, in order to meet each other's competition, besides having become commercial warehousemen have in that connection also taken on the function of writing insurance. By provisions in their tariffs, first published early in 1930, each of the appellants, except the Jersey Central, agreed to assume liability for actual loss or damage by fire to property held by the carrier on storage, at a rate of 8 cents per \$100 of declared value per annum, the rate for a period shorter than one year to be in accordance with the underwriters' standard short-rate table. For this rate the carrier assumes liability for fire regardless of its negligence. These provisions were published in the same tariffs that named the storage and handling rates on westbound freight. It was provided in that connection that the storage and handling rates did not include insurance, and that insurance "must be provided by owners of freight at their expense."

Two of the appellants, the B. & O. and the Lackawanna, cover their liability by taking out insurance with regular insurance companies and for this insurance they pay a much higher premium than they charge the shippers. The B. & O. pays a premium of 50 cents per \$100 of value per annum on property stored in its Staten Island piers and from 8

to about 15 cents on crude rubber stored by it in its rented space at American Dock Stores and Pouch Terminal on Staten Island. (R. 365) The Lackawanna pays a premium of 35 cents on property stored on its piers in Jersey City.

The other appellants assume the risk without reinsuring. The standard rates of insurance companies on goods stored in the warehouses and on the piers of these appellants range from about 15.3 cents to \$1.905 per \$100 per annua. (R. 67, 193, 366) The extreme case where the standard rate of insurance companies is \$1.905 is that of the Pennsylvania's pier C at Jersey City. (R. 67; finding No. 96, R. 366.) Yet the Pennsylvania, as warehouseman, assumes for the owner and regardless of the company's negligence, liability for actual loss or damage by fire of goods stored on this pier at a rate of 8 cents per \$100. The Commission and the court below found that the difference between the rate it charges for this insurance, 8 cents, and the standard insurance rate, \$1.905, applied to a carload of rubber weighing 40,000 pounds, of the value of 17 cents per pound or a total of \$6,800, is \$124.10 per carload per annum. (R. 67, 366)

So that, if the owner were obliged to pay the standard insurance rate on his carload of rubber stored on this pier for one year (and the record shows many instances of rubber stored in the New York district for periods of a year or more, cf. R. 181) his premium at the rate of \$1.905 would be

\$129.54, whereas under the carrier's rate of 8 cents per \$100 the premium amounts to only \$5.44, the difference between the two premiums being \$124.10.

Thus, the fair value of such insurance would seem to be \$129.54 and this is also the established or prevailing rate, and the carrier's charge is \$124.10 below that rate. It may be noted in this connection that the carrier's line-haul rate from the New York district to Akron, Ohio, is 40 cents per 100 pounds. (R. 49) Thus the freight charges on this carload weighing 40,000 pounds would be \$160. If the concession in insurance to the extent of \$124.10 be deducted from the freight charges, the carrier would have left only \$35.90.

The Commission's findings show clearly that the *only reason* for these below-cost insurance rates of the appellants was to meet each other's competition. Finding No. 95 of the court below (R. 365-366) summarizing Commission findings, reads:

The Pennsylvania found on numerous occasions that, because of its high insurance rates on goods stored with it under the storage-in-transit privilege, *it was unable to compete with the other trunk-line carriers for west-bound storage-in-transit freight.* Although its traffic officials recognized that *"one of the principal reasons the carriers are erecting these expensive modern facilities is to attract business,"* and realized that the insurance rates at the modern up-to-date water-front facilities of the Pennsylvania,

Erie, Delaware, Lackawanna & Western and other New York lines, for storage of transit freight, were much lower than could be obtained at other carrier facilities where the fire hazard was greater, and expressed doubt as to the legality of a uniform insurance rate to meet the competition of the lines with the more modern facilities, and strongly recommended that a uniform insurance rate be opposed by the Pennsylvania, nevertheless the Pennsylvania later became a party to the 8-cent rate *in order to meet competition.*

The action of the Jersey Central in refusing to meet the low rate of the other New York carriers indicates the close association between the line-haul rates and these storage, handling, insurance, and other commercial warehousing rates. The Jersey Central has never been a party to the arrangement agreed to by the other appellants under which they grant insurance at an equalized uniform rate and has at no time itself issued such insurance nor published an insurance rate of 8 cents per \$100 of value, for the reason that on account of its short hauls, its rails extending westward only to Scranton, Pa., it receives only a small revenue or division, and cannot afford to assume any losses in connection with insurance. At its piers 11 and 14, Jersey City, in which it uses space for storage of goods granted the storage-in-transit privilege, its insurance rate is \$1.29 per \$100 of value, and it has refused to lower this rate to meet the rate of 8 cents made by

the other appellants. (Finding No. 98, R. 366-367.)

After the issuance of the Commission's first report, the appellants, through a committee, gave consideration to the subject of insurance. That committee reported to the executives that "as a competitive matter it is necessary that the insurance rates in the warehouses of all railroads be substantially the same." In its report reference was made to the fact that the 8 cents per \$100 of value—

is much below the rates ordinarily prevailing for such insurance, and in instances where the carriers reinsure they are compelled to pay a higher rate and bear the difference. * * * (R. 193)

After making the above findings the Commission stated "No reason for such insurance practices appears, except the competitive feature above mentioned." (R. 194")

The Commission's first report states that the Vice President of the New York Central "cited competition for traffic among the carriers as one of the reasons for building warehouses and the measure of the charges for storage." (R. 99)

"The Vice President of the Lackawanna, with many years' experience as a traffic official who has been active in the promotion of his company's

¹⁸ Other findings of the Commission as to this insurance appear at R. 39, 50, 53-56, 66-67, 76, 112, 192-193, and all are summarized in the findings of the court below, findings Nos. 85-99, R. 363-367.

warehouse activities and is familiar with the general policy of the management, testified that it is reasonable to conclude that the only reason for the Lackawanna's low charges for westbound storage was the competition of other carriers. The witness, speaking of the low charges, stated: 'I don't think any one can say that there is any money to be made out of this, * * * there is no use to beat around the bush, this storage over here does not pay its way.' " (R. 99)

In its second report, the Commission, further referring to appellants' position in regard to their below-cost storage, handling and insurance charges, said that, generally speaking, their position with reference to storage of westbound crude rubber "is that by furnishing the storage some business is obtained for their lines which would otherwise not move thereover." "While recognizing that the amounts received for the handling and storage do not equal the cost of those services, they attempt to justify the present practices by claiming the right to offset the storage, handling, and insurance losses against the line-haul revenue." (R. 182)

As shown in the first report, the carriers made certain increases in their storage rates after the first hearing (R. 102), but they did not increase those applying on crude rubber and wood pulp, which commodities amount to approximately 75 percent of the westbound freight stored at the Port of New York. (R. 180)

Various reasons were advanced by respondents' witnesses for their failure to increase these rates, the principal one being the fear of loss of business to other ports and to other forms of transportation. In this connection the Commission found:

In 1930 the movement of crude rubber by barges and trucks from New York to Akron, Ohio, was a matter of grave concern to the respondent carriers, and they gave serious consideration to the means they felt should be employed to retain the then existing traffic and secure additional traffic for rail movement. Individual and joint conferences with the large rubber manufacturers located at and in the vicinity of Akron resulted in a so-called "gentlemen's agreement", the effect of which was a reduction by the rail carriers in the rate on crude rubber from New York to Akron from 47 to 40 cents per 100 pounds, effective March 1, 1931, and a reduction in rates on motor-vehicle tires from Akron to New York. In turn, these rubber manufacturers agreed to move their shipments by rail, and this agreement is being complied with. However, considerable rubber has moved by canal or truck to points other than Akron. Witnesses for respondents contend that an increased storage rate, with resultant higher cost for movement from shipside to destination, would break the "gentlemen's agreement", and that the rubber manufacturers would then be free to use competitive forms of transportation. (R. 183)

"The record supports the conclusion," the Commission found, "that shippers of rubber and wood pulp who use storage facilities owned or controlled by respondents were of sufficient importance from a traffic standpoint to successfully resist the imposition of higher storage rates, while shippers of many other commodities were compelled to pay greatly increased storage rates in railroad owned or controlled warehouses or to seek other storage facilities. The record is not convincing that it would be advantageous to shippers to divert a substantial amount of rubber or other traffic through other ports or to other forms of transportation if the storage rates on such traffic should be increased. In any event, fear of such diversion would not justify respondents in violating any provision of the Interstate Commerce Act." (R. 183-184)

The appellants' motive here seems to be about the same as that which caused the New York Central to grant concessions from the published line-haul rates on sugar from New York City to Detroit condemned in *New York Central R. R. v. United States*, 212 U.S. 481, namely, to prevent the shippers "from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business, * * *." (Pages 490-491) Compare *New Haven* case, 200 U. S., at pages 397-398.

The findings of the Commission, as discussed and referred to above, together with many other find-

ings as expressed in the reports, show definitely that appellants did not cut their warehouse rates in order to meet a previously prevailing "market price" or to bring them down to what was regarded as a "fair value" determined by some established standard or by "going prices," but, on the contrary, that they cut their prices below those of the independent commercial warehousemen and below their own costs to whatever level was necessary to get the business, in their competition one with another for the line-haul traffic, which usually was obtained by the line that secured the warehouse business,—the same competitive motive which caused the three competing roads to pay the allowances to the contract warehouses at Philadelphia: to gain traffic, condemned as rebates and as causing discrimination in violation of sections 2 and 3 in *Warehouse Company v. United States*, 283 U. S. 501.

Thus, appellants' contention that the only basic finding which the Commission made was that appellants' warehousing charges are below cost and that the Commission did not find that these charges were below fair value, is erroneous. We agree with appellants that orders of the Commission must be supported by adequate findings, as held by this Court in *Florida v. United States*, 282 U. S. 194, 215, *United States v. Baltimore & Ohio R. R.*, 293 U. S. 454, 462-465, *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, and other

cases. But, as held by this Court in the second Florida case, *Florida v. United States*, 292 U. S. 1, 9, reasonable determinations only are required. In several other cases the Commission's findings have been sustained as adequate over contentions as to their insufficiency, including *Georgia Commission v. United States*, 283 U. S. 765, 773, *Alabama v. United States*, 283 U. S. 776, 779, *United States v. Louisiana*, 290 U. S. 70, 75-82, *Ohio v. United States*, 292 U. S. 498, 511. The sufficiency of the findings is to be determined in the light of the facts and circumstances in each case. In the case at bar we submit the findings are adequate and fully support the Commission's order.

II

The order, prescribing costs as the minimum, to correct violations of sections 2, 3, and 6 of the act, is fully supported by the principle established in the *New Haven* case

In the *New Haven* case (200 U. S. 361) this Court established the principle that if a carrier engages in a trade activity beyond its common carrier duties and sells a commodity at a price insufficient to pay the cost of the commodity and the published freight rates for its transportation, it violates the prohibitions (section 6, par. 7) of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates, and discriminates against other shippers over its line, in violation of sections 2 and 3.

The essential facts were that the Chesapeake & Ohio Railway had entered into a contract to sell a large quantity of coal to the New Haven Railroad at a price of \$2.75 per ton, delivered to the New Haven at ports in Connecticut reached by its line. The C. & O. purchased the coal from mines on its line in the Kanawha district of West Virginia, transported it over its railway to Newport News, Va., and there turned it over to an ocean carrier with whom it had contracted for transportation to the points of delivery. The price of the coal at the mines where the C. & O. bought it and the cost of the ocean transportation from Newport News to Connecticut aggregated \$2.47 per ton, leaving the C. & O. only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, while the published tariff for like carriage from the same district was \$1.45 per ton.

In resolving the question presented the Court first considered the purpose of the Act. It said:

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that in-

interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. (Page 391)

The Court then held that the prohibitions of the statute are applicable to *every method of dealing by a carrier* by which the forbidden result could be brought about:

That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be

brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. (Pages 391-392)

The purpose of the statute, the Court held was "to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal." (Page 392)

"Indeed" the Court said, "the inevitable result of the possession of such a right by a carrier would be to enable it if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation

to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer." (Pages 392-393)

The asserted right of a carrier to become a dealer in commodities which it transports, "*and as such dealer to sell at a price less than the cost and the published rates*" was denied, for the following reasons:

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers as between themselves and in their dealings with the carrier would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would

be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning 'undue or unreasonable preference or advantage,' 'undue or unreasonable prejudice or disadvantage' and 'unjust discrimination' are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. (Page 395)

The Court further held that, as the prohibition of the Interstate Commerce Act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by

the C. & O. from the contract, the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the C. & O. its published tariff of rates. "*This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates.*" (Page 398)

Rendered in 1906, the decision in the *New Haven* case is a milestone in the development of interstate commerce law, has never been modified, and has been repeatedly cited with approval in subsequent decisions of this Court, including *Warehouse Co. v. United States*, 283 U. S. 501, 513.¹⁶

The right asserted on behalf of the carrier in the *New Haven* case to deal in commodities and transport them at less than the published rate is essentially the same as that claimed by appellants here, and it seems equally apparent that if a carrier may

¹⁶ Also: *Central Vermont Co. v. Durning*, 294 U. S. 33, 41; *K. C. S. Ry. v. U. S.*, 282 U. S. 760, 764; *L. & N. R. Co. v. U. S.*, 282 U. S. 740, 753; *U. S. v. Koenig Coal Co.*, 270 U. S. 512, 519; *U. S. v. L. V.*, 254 U. S. 255, 270; *U. S. v. D. & W. R. R.*, 238 U. S. 516, 520; *U. S. v. Union Stock Yards*, 226 U. S. 286, 307; *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, 166; *L. & N. R. R. v. Mottley*, 219 U. S. 467, 477; *N. Y. C. R. R. v. U. S.*, 212 U. S. 481, 495; *American Express Co. v. United States*, 212 U. S. 522, 531; *Armour Packing Co. v. United States*, 209 U. S. 56, 72.

engage in the commercial warehouse business at charges less than its cost for performing the services and draw upon its line-haul revenues to make up the deficiency in the warehousing charges, it possesses a power which no other commercial warehouseman possesses and is thus in a position completely to monopolize the commercial warehouse business along its line, and indeed any similar business it might choose to enter.

In its second report the Commission said:

It was urged on behalf of the complaining warehousemen that the engagement of the respondents in the business of commercial warehousing would ultimately drive such warehousemen out of business, and result in a monopoly by the respondents of commercial warehousing in the Port of New York district. *There appears to be a basis for their fears,* * * * (R. 191)

The court below, after observing that in the *New Haven* case "the sale and transportation of coal at less than the cost of the coal plus transportation at tariff rates was held to violate sections 2, 3 and 6 of the Interstate Commerce Act," said:

In giving effect to the remedial provisions of the Act to prevent discrimination between interstate shippers and the granting of preferences either directly or indirectly, we can find no real distinction between furnishing transportation of goods plus commercial warehousing, or insurance, or both at rates

less than those of the published tariff plus the cost of what warehousing and insurance is furnished and the sale of coal to be delivered at a price which did not cover its cost in addition to the tariff rates for transportation. In the present instance commercial warehousing, storage and insurance were sold instead of coal, a circumstance creating no difference so far as the principle which controls is concerned. (R. 306-307)

Appellants, attempting to distinguish the *New Haven* case, argue in substance that the price at which the C. & O. sold the coal to the New Haven was less than the market price, that this constituted the concession, without which there would have been no violation of sections 2, 3 and 6. But there is nothing in the opinion that lends support to this suggestion. The contract was for a long term, and in course of time the contract price might have become either higher or lower than the fluctuating market price of coal delivered in Connecticut. Whatever that market price might be, there were violations of sections 2, 3 and 6 of the Act if the *contract price* was insufficient to pay the cost of the coal, the cost of the ocean carriage and the carriers' published transportation rate.

The substance of the holding is that the carrier cannot make up losses in commercial dealing by drawing upon its transportation charges and thereby reducing its published tariff rate. This salutary principle, obviously of great importance,

would seem manifestly to apply to dealings by common carriers subject to the Act in any other article or commodity of commerce and also to commercial warehousing, storage and other activities beyond the carriers' transportation duties.

III

Appellants have no legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect is to transport the property in interstate commerce at less than the published tariff rates

None of the decisions cited by appellants establishes that they have a legal right to maintain commercial warehousing charges that are below costs for the purpose of inducing the movement of competitive traffic over their respective lines, where the effect, as here, is to transport the property in interstate commerce at less than the published tariff rates. On the contrary, the provisions of the Interstate Commerce Act, especially sections 2, 3 and 6, as interpreted by this Court in the *New Haven* case, *Warehouse Co. v. United States*, and other cases, deny the existence of such a right.

Appellants' argument to the effect that there is no concession unless it is of value to the shipper overlooks the fact that railroads often grant rebates and concessions, whereby the property is transported at less than the published tariff rate, for their own reasons and for their own benefit, as, for

instance, to meet the competition of other railroads or of water carriers or motor trucks, where the concession or rebate is not of actual value to the shipper because he could get the transportation of his goods by another carrier for the same net charge. This is illustrated by the decision of this Court in *Wight v. United States*, 167 U. S. 512. There the warehouse of the consignee, F. H. Bruening, in Pittsburgh, was served by a side track of the Panhandle (now Pennsylvania) which enabled him to get delivery of shipments of beer from Cincinnati at his warehouse at the published rate of 15 cents per 100 pounds without extra charge for drayage. Beer shipped from Cincinnati over the B. & O. to Pittsburgh could not be delivered over this side track and would have to be drayed from the B. & O. station to Bruening's warehouse. To meet the competition of the Panhandle and to attract the traffic to its line, the B. & O. agreed to pay the drayage, amounting to $3\frac{1}{2}$ cents per 100 pounds, with the result that its tariff rate, which was also 15 cents, was cut to $11\frac{1}{2}$ cents. Perhaps this benefited the B. & O., because it enabled it to get the traffic, although at a reduced, possibly non-compensatory rate, but it did not result in any monetary advantage to Bruening because he obtained his transportation over the B. & O. for only what he would have paid had it moved over the Panhandle. Yet there was a clear concession from the B. & O.'s

tariff rate, since the amount it retained was $3\frac{1}{2}$ cents less than its tariff rate. Under appellants' argument this would be lawful, notwithstanding the plain prohibitions of the Act, on the ground that nothing of value passed from the B. & O. to Bruening. Moreover, there was an unjust discrimination against another beer dealer in Pittsburgh, for whom the B. & O. refused to dray.

In *New York Central R. R. v. United States*, 212 U. S. 481, the carrier was convicted of granting rebates and concessions upon shipments of sugar from New York City to Detroit, Mich. One of the reasons for giving the rebates was to prevent the shippers "from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business. * * *". Perhaps the shippers were not benefited by the rebates, since they could have obtained transportation of the sugar from New York to Detroit at the same net rate that the rail carriers charged (tariff rate minus the rebate) by resorting to the water route. But that was immaterial, in view of the positive command of the statute against transportation by the rail carrier at less than its published tariff rate.

See also *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444; *United States v. Union Stock Yard*, 226 U. S. 286, 301-309; *United States v. Koenig Coal Co.*, 270 U. S. 512, 519; *Dye v. United States*,

262 Fed. 6 (4 C. C. A.); *Spencer Kellogg v. United States*, 20 F. (2d) 459 (2 C. C. A.), certiorari denied, 275 U. S. 506; *Armour Packing Co. v. United States*, 209 U. S. 56.

Citation of cases in which the rebate or concession was valuable to the shipper does not establish that carriers may transport property in interstate commerce at less than the published rate, contrary to the provisions of the statute, in all instances where they can show that there was no ensuing benefit to the shippers. It usually happens that when a carrier grants a rebate or concession it is of value to the shipper. The findings of the Commission, as above quoted, show that in the present case this was true, that the carriers' below-cost warehousing charges were of distinct and definite value to the shippers, that the below-cost charges were inducements to the shippers to use the rail facilities of the carriers granting them, were lower than they could get from competing commercial warehousemen, who can not maintain below-cost charges.

But, even if it were true, that the below-cost commercial warehousing charges of appellants were of no value to the shippers (on the ground that they could get the same low charges by using warehouses of the independent warehousemen, which the Commission's findings deny), there would still be departures from the published tariff rates, in violation of the statute, since the carriers would have to

draw upon and reduce their published tariff rates to make up their losses resulting from their below-cost warehousing charges made for the purpose of meeting the competition of private dealers in a business in which the carriers are not required by the statute to deal.

Appellants argue that certain previous decisions of the courts and the Commission establish "fair value" as the only lawful criterion and that therefore, as a matter of law, the Commission's order prescribing the cost basis is invalid, citing *Cleveland, C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849 (6th C. C. A.), *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292 (5th C. C. A.), *United States v. Northern Pac. Ry. Co.*, 18 Fed. (2d) 299 (D. C., E. D., Wash.), *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663.

These decisions, relating to leases of land—surplus land not needed by the carrier in its railway operations—fully sustain the principle underlying the Commission's findings of violations of sections 2, 3 and 6 of the Act, and do not preclude the Commission from making an order prohibiting appellants from going below costs in their commercial warehousing charges, as the proper means to correct the particular situation here disclosed. Nor do they overrule the decisions of this Court in the *New Haven* case, and *Warehouse Co. v. United States*, *supra*.

IV

The below-cost warehousing rates of appellants dissipate their revenues, cause unjust discrimination against particular shippers and against the general body of shippers over their lines, in violation of sections 2, 3 and 7 and of the purpose of the act (section 15a) to maintain adequate national railway service

Appellants below-cost warehousing rates cause unjust discrimination not only against particular shippers but, the Commission found, also against "all persons who are compelled to bear the carriers transportation rates which are dissipated by their storage practices," (R. 192) in violation of sections 2, 3 and 6, as originally enacted in 1887, and also in violation of later enactments broadening the scope and purpose of the regulatory measure, in order, among other things, to develop and "maintain an adequate railway service for the people of the United States." *Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189-190; *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478; *R. R. Comm. v. Southern Pac. Co.*, 264 U. S. 331, 341, 347; *United States v. Louisiana*, 290 U. S. 70; *Florida v. United States*, 292 U. S. 1, 7-8.

The last-cited case explains the amendments to section 15a made by Emergency Railroad Transportation Act, 1933. As there stated, under the amended section "The Commission is to consider, among other factors, * * * 'the need, in the public interest, of adequate and efficient railway

transportation service at the lowest cost consistent with the furnishing of such service'; and "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.'" (292 U. S. 7) The Court further said:

The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It is rather designed to aid that control in the light of the depressed economic condition of the railways. (*Id.*, 8)

The term "rates" as used in amended section 15a (2) is defined in paragraph (1) as meaning "rates, fares, and charges, and all classifications, regulations, and practices relating thereto." Thus in considering practices, such as the carriers' warehousing practices here involved, and prescribing a rule of action for the future in connection therewith, the Commission is to give effect to the broad purpose and intent of the amended section.

The serious losses resulting from the carriers' warehousing practices at New York, and the competitive waste, "deserving of most careful consideration" (R. 111), have already been shown.

That such losses continued is shown by the second report. See, e. g., R. 128, 134, 137-138, 151-152, 161, 174.

There are several clear indications that unless the carriers' warehousing practices at New York

are corrected similar practices will spring up elsewhere throughout the country. In its first report the Commission mentioned the "active competition and intimate relationship between the various North Atlantic ports, and the necessity of each port offering storage facilities, practices, and charges equal to those at other ports." (R. 33)

The interest of the Boston Port Authority is indicated by its intervention in this suit. It appeared in the proceedings before the Commission seeking to introduce testimony to prove that the practices at New York resulted in undue prejudice and unjust discrimination against the Port of Boston. The inference here is clear—if the below-cost rates, rents, and other warehouse practices continue at New York, the carriers will probably be forced to adopt similar practices at Boston.

Witness Tilly, president of an independent commercial warehouse company in New York, testified that the subject of the carriers "taking merchandise at a mere fraction of the cost", and absorbing the difference elsewhere from other services, is a matter that has concerned his company for many years; that Mr. Spencer, Warehouse Superintendent of the Pennsylvania Railroad, was very much alarmed about the situation as it existed in New York, particularly because of the comparison it made with users of other Pennsylvania Railroad warehouses. Mr. Spencer had charge of all warehouse operations of the Pennsylvania, and there

were certain places where he was charging reasonable rates for storage, and his customers were complaining that the Pennsylvania was giving them an average of 1 cent per 100 pounds in the New York warehouse, while at Pittsburgh, Chicago and elsewhere were charging rates better than 3½ cents per 100 pounds for storage. "Mr. Spencer, together with us and Mr. Quinn of the Pennsylvania, tried to have the matter adjusted, but we got the same answer that I expected at the time, the same answer that I got in talking with each individual railroad, 'Yes, we admit this practice is known; yes, we admit the charges are too low, but since the others charge it we can't correct it.' In that we were joined by Mr. Morton of the B. & O. [Manager, B. & O. Stores] We got no where." (Tr. 1761-1762)

It does not seem likely that the carriers can localize their competition through warehousing at below-cost rates to the Port of New York district. If the practice is sanctioned and permitted to continue there, it seems inevitable that it will spread, with still larger revenue losses which must be made up and paid by the public through increased railroad rates, or, in any event, rates higher than they should be because they bear large warehousing losses.

Competitive waste is of national concern, *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277-278, *Colorado v. United States*, 271 U. S. 153, 163. It is

the primary aim of the policy of the amended act to secure the avoidance of waste. *Texas v. United States*, 292 U. S. 522, 530.

V

The Commission, though holding in its third report that tariffs publishing the storage, handling, and insurance rates on freight stored under the transit privilege should be filed, affirmed its prior finding that the services under these rates are not transportation services.

Appellants argue under point 3 of their brief, that while the Commission found in its first and second reports that the storage under the transit privilege and the handling and insurance of freight so stored were nontransportation or commercial services, and were not therefore lawful subjects of tariff publication, it reversed this finding in its third report, wherein it held that such rates and charges should be published in filed tariffs, and that this was tantamount to a determination, as under the decision in *United States v. American Tin Plate Co.*, 301 U. S. 402, 408, it was empowered to make, that they are "transportation" services within the meaning of sections 1 (3) and 6 (1) of the Act.

It is true the Commission said in its third report that these tariffs should be filed, but in so saying it affirmed the holding in its prior reports that these are commercial warehousing services, not transportation services. (R. 105, 111, 188-191, 271)

Thus the Commission has definitely and expressly made the determination, such as this Court held in the *Tin Plate* case it has authority to make, as to what is or is not transportation; and its simultaneous ruling that the tariffs in question should be filed (obviously for policing purposes) is not tantamount to an opposite determination, as appellants suggest.

In its third report it said: "What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services *which are not within their common-carrier obligations*, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods." (R. 271) Continuing, it said, "The tariffs now on file are instruments which work violations of the Act, in that through them respondents hold themselves out to perform *commercial* services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the Act." (R. 271)

Whether the charges were published or not, they covered commercial services, and the fact that the charges were unduly low, coupled with the fact that they were held out as an inducement to attract the movement of competitive traffic over appellants' rail lines, with the result that the aggre-

gate charge was not sufficient to pay the cost of furnishing the commercial warehousing services and the appellants' published line-haul rates, was the essential basis for the finding of their unlawfulness. The Commission's order does not require that appellants' commercial services under these tariffs shall be continued, nor that they be discontinued. It does require, if the services are continued, that the charges be brought up to at least a compensatory basis and that tariffs covering them be filed with the Commission.

The fact that appellants' below-cost rates for storage, handling and insurance on freight stored under the transit privilege were published in appellants' tariffs did not prevent them from causing the discriminations and other violations found by the Commission

Appellants further argue under Point 3 in their brief that the Commission's conclusion that concessions with their ensuing discriminations, preferences and prejudices result from the performance of "transportation" services at less than cost is defective because it ignores the fact that all these "transportation" services are held out by published tariffs and are available to all at the same charges.

The argument assumes that the services in question are transportation services, whereas the Commission found that instead they are nontransportation, commercial services.

Tariffs covering these services were published and filed with the Commission, notwithstanding

they were commercial as distinguished from transportation services, but this fact does not tie the Commission's hands in the making of a corrective administrative order. For the Commission, in the exercise of its administrative authority, can and should look through the form to the substance of a transaction and pronounce it to be what it really is. As said in *I. C. C. v. B. & O. R. R.*, 225 U. S. 326, 345, "Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the form to what caused them and what they are intended to cause and do cause."

In *Warehouse Co., v. U. S.*, *supra*, at page 511, the Court said: "Where a forbidden discrimination is made, the mere fact that it has long been continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." Compare *U. S. v. Am. Tin Plate Co.*, 301 U. S. 403, 406-407.

The Commission's findings are to the effect that the below-cost warehousing rates of each of the appellants were published with a view to attracting as much traffic as possible to its warehouses in order to secure the line-haul movement of such traffic over its railroad in competition with the railroads of other appellants, with the knowledge that the warehousing rates were below cost and with the intent of drawing upon and reducing its line-haul rate in order to make up the deficiencies in the warehousing rate. The order has relation to dis-

discrimination in *transportation* rates, growing out of the fact that certain shippers are in a position to avail themselves of the unduly low, less-than-cost warehousing rates of the carriers and thus obtain line-haul transportation at rates which are lower than those published in the filed tariffs, while all others must pay the full tariff rate undiminished by the benefits of below-cost warehousing, and pay for the revenue deficiencies caused by the carriers' losses in warehousing, shown in this case to be so substantial in the aggregate as to affect adversely the public interest. It is futile to argue that this discrimination is cured or its nonexistence proved by pointing to the very thing that causes the discrimination.

Moreover, a contention that there is no discrimination because any one can get the carriers' below-cost warehousing services simply asserts that a shipper, having a right to use the transportation facilities of the carrier as a public servant without discrimination in any respect whatsoever, in order to avoid discrimination, must use the carriers' warehousing facilities for his commercial storage.

The contention is unsound in still another respect: It is oblivious to the carriers' duty not to discriminate against independent commercial warehousemen who are shippers over the carriers' lines and "persons" within the meaning of sections 2 and 3 of the Act entitled to the protection afforded thereby. Appellants' contention, if sustained, would leave such shippers exposed to unrestrained

warehouse rate-cutting by the carriers who always have their line-haul transportation revenues to draw upon to make warehousing rates as low as is necessary to get the business.

The Commission found that all shippers whose commercial operations permit them to use the railroads' warehousing facilities and thereby obtain the benefit of their below-cost charges receive an undue and unreasonable advantage over those whose commercial practices will not permit of their placing their goods in storage at New York but require direct shipment to destination (R. 192), and those who store their goods in warehouses operated by competing independent warehousemen (R. 197). There was the further finding that such prejudice and disadvantage extends to all persons who are compelled to bear the carriers' transportation rates which are dissipated by their storage practices (R. 192).

This discrimination is not cured by appellants' holding out their own below-cost warehousing rates to all who will use them. If this were accepted as a cure it would mean that every person shipping goods to and from New York and storing the goods there would have to use the railroad warehouses, and the cure would not be complete until the competing independent warehousemen were completely eliminated and the railroads had an absolute monopoly of the commercial warehouse business in the New York district.

Appellants' argument here merely asserts in another form the right on the part of a carrier to deal in commodities or engage in a nontransportation business and transport at less than its published tariff rate, the possession of which right was denied by this Court in the *New Haven* and other cases and by the Commission in its report in this case.

Since the storage services here considered are commercial, or nontransportation services, the appellants' contention that they may lawfully render *transportation* services at less than cost, or that under some circumstances they may even be compelled to render such service for less than cost, need not be discussed.

VI

The order for the future rightly corrects the discriminations and other violations of the act by requiring removal of the means by which they were accomplished.

If, under the facts and circumstances of this case, violations of the Interstate Commerce Act result from the fact that appellants' warehousing rates and charges are below cost, as found by the Commission, then it is within the Commission's power, under section 15 (1) of the Act, to require removal of the violations by directing that appellants cease and desist from charging warehousing rates that are below cost. Unless this is so, the anomalous situation would result that although appellants are violating the Act, the Commission is without power

to compel them to cease and desist from such violations, notwithstanding the provisions of section 15 (1), authorizing the Commission, whenever it finds after hearing that any practice is violative of any provision of the Act, to make an order that the carriers "shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

Here, the Commission finds that violations exist to the extent that the appellants' warehousing rates and charges are below cost, and its order that they shall cease and desist from furnishing the services, etc., to interstate shippers over their respective lines at rates below cost is the virtual equivalent of an order requiring that they cease and desist from the violations found.

In the Philadelphia case, *Warehouse Co. v. United States*, *supra*, the Commission found that the granting of the allowances resulted in unjust discrimination and undue prejudice in violation of sections 2 and 3 of the Act, and its order removed the discrimination and prejudice by requiring the carriers to cease and desist from paying the allowances.

This Court said the Commission "rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished." (283 U. S., page 513)

In the present case the Commission finds violations of sections 2, 3 and 6 (7) and since these

violations are brought about as a result of the below-cost rates and rents of the carriers, the Commission rightly requires the correction of the violations by ordering that the carriers shall not in the future make below-cost warehouse rates and rents to interstate shippers over their respective lines.¹⁷

In *U. S. v. American Tin Plate Co.*, 301 U. S. 402, and *U. S. v. Pan American Corp.*, 304 U. S. 156, this Court sustained orders condemning allowances made for spotting services within large industrial plants. In the *Tin Plate* case it said:

Since the Commission finds that the carriers' service of transportation is complete upon delivery to the carriers' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

Similarly, here, there would seem to be power to enjoin the performance of the commercial ware-

¹⁷ It is significant that the order is not of general application but is strictly limited to the carriers' dealings with interstate shippers over their respective lines.

Cf. *R. 148*, where the Commission refused to find that the effect of certain noncompensatory storage charges worked departures from the carriers' published transportation charges, on the ground there was no evidence to show that the persons availing themselves of the storage were shippers by rail in interstate commerce.

house services at less than cost, in order to correct the violations found.

Appellants' brief suggests that the order requires rates that will yield a return on the investment in the operation of their warehouses, and depreciation. The Commission's reports find definitely that depreciation is a part of the costs. (R. 174-175) As to return on investment, the order does not require that appellants make warehousing and storage rates and space rentals that will yield a profit. It simply sets costs as the minimum. Nothing in the order prevents them from exceeding this minimum, and earning a profit, if they can. Where interest is properly a part of the costs, it is clear it must be included, but there is nothing in the report and order that rigidly requires the original or historical cost of construction of buildings to be used as the basis. Some of the appellants' warehouse buildings were constructed prior to the World War, the newer and larger warehouse buildings were constructed during the period from 1926 to 1934. Under the formula for the determination of revenue per square foot of net space that is needed for profitable warehouse operation, adopted by the American Warehousemen's Association after many years of investigation, the item of rent, or in lieu thereof, the costs incident to ownership, are to be based on present-day or current values, no matter what the terms of the lease or the original cost of the building. (See Exhibit No. 180, page 1.)

If appellants are in doubt as to whether in particular instances interest on investment is to be deemed a profit, or part of the costs, their proper procedure is to apply to the Commission for a ruling. In *American Express Co. v. Caldwell*, 244 U. S. 617, 627, this Court said: "If an order is believed to lack definiteness an application should be made to the Commission for further specifications."

It is obvious that the order does not attempt to require what might be impossible, that appellants' warehouses be operated at a profit. The report makes reference to a formula presented by the complaining warehousemen which purports to show the rate per annum necessary to secure a fair return per square foot of warehouse space in the Port of New York district. (R. 41) This and other formulae, which were fully explained, show approved methods for determining the cost per square foot of warehouse space and storage costs. The determination of these costs involve, first, the plant expense, including rent, or, if the building is owned by the warehouseman, such expenses as taxes, insurance, maintenance, and depreciation; second, the cost of operating the warehouse, including salaries and wages, heat, light, office space, and other operating expenses. Dividing the total of these costs by the total number of square feet in the warehouse gives the total cost per square foot of gross area. Since the entire or gross area cannot be utilized for storing goods, there must be deducted

the space occupied by stairways, elevator shafts, offices, laborers' rooms, aisles, etc., to determine the net or occupiable space available for the storage of goods; and from the cost for gross area, the cost per square foot of net or occupiable space for storage is determined. In a similar manner the cost per square foot of space rented or to be rented may be determined.

Allowance must be made, however, for unoccupied space, since a warehouseman cannot expect that his warehouse will be 100 percent full at all times. The extent of the occupancy at a particular time does not enter into the calculation. Experience throughout the country over a long period of time indicates that the average warehouse occupancy is $66\frac{2}{3}$ percent, and this is used as a basis in determining costs.¹⁸

¹⁸ This method of determining costs was exhaustively explained by warehouse experts. Wilson, Tr. 970, 1011-1042; Drake, Tr. 1448-1451; Carruth, Tr. 1626, 1628-1676; Little, Tr. 3896-3919.

In the exposition of "Scientific Rate-Making in Theory and Practice," in Exhibit No. 180, p. 1, after explaining the method of ascertaining "net space," the question of extent of occupancy is considered, as follows:

"Now this net space cannot be kept 100% full at all times. A certain amount must be set aside to provide for special services, such as weighing, sampling, rehandling, inspection of stock, etc. Then there will be space left vacant by failure of lots, as received, to fill entirely the space allocated for their accommodation. Also there will be idle space during dull periods. It is estimated that a $66\frac{2}{3}$ % average occupancy of net space is a reasonable assumption; con-

Rates based on $66\frac{2}{3}$ percent average occupancy would obviously be lower than if based on 50 percent average occupancy. Hence, if the actual average occupancy in the railroad warehouses in New York were 50 percent and not $66\frac{2}{3}$ percent, using the latter figure would result in lower costs and, under the Commission's order, lower minimum

sequently, if the warehouseman expects that his net space will maintain an average occupancy of $66\frac{2}{3}\%$, it will be necessary for him to charge 50% more for it than he would require in the case of a 100% average occupancy. Thus having ascertained the necessary revenue per square foot of net space, he increases the amount by 50%; and, if the foregoing calculations have been made on a yearly basis, the result is to be divided by 12."

In the cost accounting method entitled "Method of Determining Reasonable Costs in the Merchandise Warehousing Trade," approved by the National Recovery Administration, September 6, 1934 (Exhibit A-64), $66\frac{2}{3}$ percent is again taken as the average occupancy:

"A warehouseman can expect an occupancy, averaged through a term of years, of not more than two-thirds of the area upon which he can actually pile merchandise—two-thirds of the 'occupiable space.' This is the 'average occupied space.' For determining the cost per square foot, a factor not less than two-thirds of the 'occupiable space' is used to arrive at the 'average occupied space' over an annual period." (Exhibit A-64, p. 9)

Numerous warehousemen testified as to their costs, comparing them with the warehousing rates of the carriers to show that the carriers' rates were below the carriers' costs and also below the cost of any commercial warehouseman in the Port of New York district. Drake, for example, said that the storage rates of the railroads were below the cost of service level at his warehouse and below that of any commercial warehouse in the Port of New York district. (Tr. 1445)

rates, and presumably this would not be objectionable to appellants, since their desire seems to be to make warehousing rates as low as possible.

In their brief, page 27, appellants say "the Commission's reports seem to contemplate interest and depreciation on investment at some *unstated* rates, and taxes," and in a footnote on page 6 they refer to penalties that may be imposed for violation of the order, wherein, they say, cost is not defined with sufficient certainty. If appellants compile their cost figures in good faith, it is not reasonable to suppose that penalty suits would be instituted. If appellants should be in doubt as to any matter involved in the compilation, conferences and consultations with the Commission and its staff will be available. In the recent decision of this Court in *A. T. & T. Co. v. United States*, 299 U. S. 232, sustaining an order of the Federal Communications Commission in regard to accounting, the telephone company contended that the order was vague in several respects, and that the company would be subject to penalties for disobedience. One of the requirements was that charges to certain accounts should be no more than is "just and reasonable." The Court sustained this requirement as not unduly vague, and pointed out that "only if knowingly and wilfully so entered is any penalty prescribed therefor" (Page 246) Under section 16 (8) of the Interstate Commerce Act a carrier is subject to penalties only when it "know-

ingly" fails or neglects to obey an order. At page 245 the Court said: "Penalties do not follow upon innocent mistakes," and, at page 247, "If particular situations shall develop ambiguity or doubt, the Commission will be available for clarifying instructions."

VII

The order is a valid exercise of the Commission's regulatory power and therefore does not deprive appellants of their liberty or property in contravention of the Fifth Amendment

Appellants' contention that the order contravenes the Fifth Amendment is predicated solely upon their contention that it is not supported by proper findings and is therefore an unlawful exercise of the Commission's regulatory power. We submit that the findings are adequate and that the order is valid. The contention is further answered by the decision of this Court in *O'Keefe v. United States*, 240 U. S. 294; 304, holding that the contention that "the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, by denying to it the right to contract and compete for traffic originating on the line of the Louisiana & Pacific, is transparently unsound", since

The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by acts of Congress for considerations affecting the public welfare.

CONCLUSION

It is respectfully submitted that the decree of the court below, dismissing the petition for want of equity, should be affirmed.

ROBERT H. JACKSON,

Solicitor General.

ELMER B. COLLINS,

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J. STANLEY PAYNE,

Assistant Chief Counsel; Interstate

Commerce Commission.

THURMAN W. ARNOLD,

Assistant Attorney General.

DANIEL W. KNOWLTON,

Chief Counsel, Interstate

Commerce Commission,

Of Counsel.

NOVEMBER 1938.

APPENDIX

The Interstate Commerce Act, as amended (49 U. S. C.) provides:

SECTION 1

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation,

refrigeration or icing, storage, and handling of property transported.

(4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SECTION 2

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3

(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SECTION 15

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or

will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SECTION 15A

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The Elkins Act (49 U. S. C., sec. 41 (1)) provides:

SEC. 1. * * *

The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand

dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act; or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *

SUPREME COURT OF THE UNITED STATES.

No. 133.—OCTOBER TERM, 1938.

The Baltimore & Ohio Railroad Com-
pany, et al., Appellants,

vs.

The United States of America, Inter-
state Commerce Commission, et al.

Appeal from the District
Court of the United
States for the Southern
District of New York.

[January 3, 1939.]

Mr. Justice REED delivered the opinion of the Court.

The Interstate Commerce Commission entered an order on February 2, 1937, which directed certain carriers serving the Port of New York district to cease and desist on or before April 5, 1937, from permitting shippers in interstate commerce over the carriers' lines from occupying "space by lease or otherwise in warehouses, buildings or on piers owned or controlled directly or indirectly by, or affiliated with" the carriers involved "at rates and charges which failed to compensate said" carriers "for the cost of providing said space." The cease and desist order likewise directed the carriers to abstain from storing, handling or insuring goods for shippers at less than cost. One carrier was also directed to abstain from granting concessions to a warehouse company by means of leasing space to the warehouse company at less than the cost of the space to the carrier.

As authorized by the Judicial Code,¹ a petition in equity was filed in the United States District Court for the Southern District of New York on March 9, 1937, seeking a permanent injunction against the enforcement of the order. A hearing was had by a three-judge court pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913,² and a final order dismissing the petition entered on March 23, 1938.³ An appeal was taken directly

¹ Section 24, subsection 23.

² 28 Stat. 220.

³ For opinion below see *Baltimore & O. R. Co. v. United States* (L. C. C.), 39 F. Supp. 873.

2 *The Baltimore & Ohio R. R. Co. et al. vs. United States et al.*

to this Court as authorized by the Urgent Deficiencies Act and the Judicial Code.⁴

The order appealed from was entered in an investigation into "practices of carriers affecting operating revenues or expenses" undertaken by the Interstate Commerce Commission upon its own motion.⁵ For convenience the general investigation was divided into different parts; the one in which the order under consideration was entered is Part VI, "Warehousing and Storage of Property by Carriers at the Port of New York." The particular practices affected by the order were brought to the attention of the Commission by complaints of warehouse operators in the New York district that warehouses owned or controlled by the carriers were being operated contrary to the Interstate Commerce Act. Full reports of the investigation into the practices complained of, were made by the Commission on December 12, 1933,⁶ and June 8, 1936.⁷ The first report terminated in an admonition; the second report was followed by an order which never became effective. This order was superseded by the Commission's order of February 2, 1937, in controversy here. This last order was entered by the Commission upon reconsideration of its former reports.⁸ The Commission postponed its effective date until the injunction was brought and the lower court has entered an order for a further stay pending the determination of the appeal to this Court.

While the issues here are matters of law depending on whether admitted facts support the order, it will be helpful for an understanding of the basis of our opinion to have summarized the underlying facts found by the lower court.

The railroads affected by the order are The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company. All are subject to the Interstate Commerce Act. As common carriers they operate lines of railroad extending in a gen-

⁴ Judicial Code, Section 233.

⁵ Ex parts 104, 198 I. C. C. 124.

⁶ Interstate Commerce Act, Act of Feb. 4, 1887, c. 104, Sec. 13(2), 24 Stat. 383, as amended; 40 U. S. C. A., § 13(2).

⁷ 198 I. C. C. 124.

⁸ 216 I. C. C. 291.

⁹ 220 I. C. C. 102.

erally westward direction from the Port of New York district to various western points and compete each with the others for domestic and foreign commerce to and from the district. All united in the petition to enjoin the enforcement of the order. Their petition named as defendant the United States of America. The Interstate Commerce Commission and the Warehousemen's Protective Committee intervened. Later, orders were entered allowing the intervention of the American Warehousemen's Association, Merchandise Division; the Boston Port Authority; and the City of Boston.

It was the practice of these carriers to furnish to shippers in the Port of New York area the storage, handling and insurance which were under investigation. On account of the high price and great demand for storage space in the wholesale and retail business locations of New York, dealers must store their surplus stocks in low-rent sections. To serve those merchants who do not have their own warehouse facilities, numerous companies not affiliated with the carriers are engaged in the commercial warehouse business in the immediate vicinity of New York. Their business, like the warehouse businesses owned or operated by or affiliated with the carriers, not only covers the storage of goods but its handling in and out of cars and ships with all the incidental services connected therewith such as the issuance of warehouse receipts, inspection, cooperage, marking, and weighing.

Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the Commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which goods occupy cars or floors without any charge above the strictly transportation rate. The warehousing practices complained of are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself. All of the carriers "now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies." This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they

4 *The Baltimore & Ohio R. R. Co. et al. vs. United States et al.*

lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves. Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures. To meet the requirements of this competition the various Port of New York railroads added many new buildings in recent years. This provided many millions of square feet of space above the present needs of the district.¹⁰

Another form of warehousing is found in a development of the storage-in-transit privilege at the Port of New York. The carriers have rules and regulations governing this privilege which are published in separate tariffs filed with the Commission. These tariffs provide that westbound freight in carloads "from points within the free lighterage limits of New York Harbor may be stored in designated warehouses . . . within the Port District; and, if re-forwarded by rail within the period specified in the tariffs . . . the through rate . . . from point of origin in New York Harbor to the final destination, will be applied."

As the through rate from shipside and from warehouse is the same, if the shipment moves outbound from the warehouse over

¹⁰ Those interested in the details will find them in 198 I. C. C. 134, 216 I. C. C. 291, 220 I. C. C. 102.

the line of the inbound carrier, a shipper using carrier warehouses has the advantage of port stoppage without extra transportation cost. This tariff arrangement does not affect charges for warehousing services in connection with the storage. The storage is commercial in character and involves large tonnages. While the transportation tariffs permit varying periods of from twelve to thirty-six months for the different commodities, storage may be continued beyond this time limit at the same rate. Prior to October 16, 1934, the tariffs permitted the removal of the commodities stored at any time in any quantity and by any means of transportation without additional charge. On that date an additional charge was provided for withdrawal by means other than over the railroad which granted the storage. It will be noted that in the movement from shipside to a western destination an extra handling of the commodity is required if the warehouse is located directly on the water-front and two extra handlings if the goods must first be transported from the water-front to the warehouse and then loaded into westbound cars. The cost of these extra handlings is borne by the carrier. Insurance is furnished at a level premium rate notwithstanding the variables of the different exposures. All in all, it was determined, and this conclusion is not in dispute, that the warehouse services were performed "at rates and charges which fail to compensate" the carriers for the cost.

Through arrangements permitting distributors to avoid payment of tariff charges for storage, the Commission and the District Court found that the carriers permitted distributors of flour to get unjust and discriminatory charges.

After examining the details of cost of the various carriers for warehousing, both as storage-in-transit and ordinary storage, the conclusion of the Interstate Commerce Commission was that the commercial warehousing was carried on at a substantial loss. The term "commercial warehousing" covers all warehousing practices except those strictly a part of the operation of rail transportation. This phase of the circumstances surrounding the order may be summed up in the words of the 179th finding of fact of the District Court, which reads as follows:

"In its first report the Commission pointed out that the matters and transactions referred to therein 'are further illustrations of serious waste resulting from the competition of railroads with each other for traffic.' The extent of this waste is indicated by state-

ments contained in appendices to the report, Appendix I of which shows that the seven plaintiffs expended approximately \$35,000,000 in connection with the warehouse projects considered in the report. In its second report the Commission found that up to the close of the year 1930, the cold storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in the Port of New York District, and that within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market, notwithstanding the fact that at the time there was an unused capacity of at least 30 per cent of the then-existing facilities, and further that as of the close of the year 1930 the 43 warehouse companies operating merchandise warehouses, other than cold storage, in the Port of New York District had placed 20,450,000 square feet of warehouse space on the market in that district, and that within six years subsequent to January 1, 1929, the plaintiffs or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 per cent. Appendix II of the first report shows that the loss incurred by plaintiffs in connection with their warehouse projects during the year 1931 was \$1,260,441. Appendix III shows that the loss per ton of freight stored in transit during 1931 ranged from \$1.28 to \$6.18. These losses were added to by losses incurred on freight stored on railroad piers, and in cars, on insurance premiums, and from loans and advances. In this connection the Commission found: 'Whether or not initial advantages may have been realized at one time or another, by individual carriers, the result is that a preferred group of large shippers are now the sole beneficiaries, and are so at the expense of the carriers and the general shipping public.' And the Commission found 'that the respondents' warehousing and storage practices, charges assessed, and allowances made in connection therewith at the Port of New York district dissipate their funds and revenues, are not in conformity with efficient and economical management as contemplated by the Interstate Commerce Act, and are not in the public interest.' "

The final order of the District Court, dismissing upon these facts the petition for injunction to restrain the enforcement of the Commission's order, is attacked here upon two grounds: First, that the rendition of services to the public at less than cost is insufficient in law to establish that the carriers thereby make concessions and through such concessions are guilty of the violation of Sections 2, 3 and 6 of the Interstate Commerce Act; second, that the carriers having published and observed tariffs covering storage-in-transit cannot be guilty as to such services of violations of the same three sections.

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The carriers contend that the questions involved in charges of violations of the Interstate Commerce Act by discrimination and rebate are to be judged by the reasonable worth of the services rendered instead of by the cost to the carrier and that the charges for storage-in-transit are not warehousing costs but transportation costs and therefore it is no violation of the Act to furnish them at less than cost to the carriers.

Warehousing Charges.—The order, as entered by the Commission¹¹ and sustained by the lower court, was an exercise by the Commission of its power to cause carriers to cease and desist from practices which result in the receipt of less than the published tariffs for transportation services, with the consequence that concessions were given and preferences and advantages obtained by certain shippers. Its validity, except as it may be affected by consideration of the point that the practices were in accordance with tariffs made and filed with the Commission, depends upon whether a finding that the warehousing services were rendered at a charge

¹¹ The pertinent language of the order follows: "It is ordered, That the respondent carriers . . . be, and they are hereby, notified and required to cease and desist . . . from permitting shippers . . . to occupy space by lease or otherwise in . . . buildings, . . . owned or controlled . . . by . . . respondents . . . at rates and charges which fail to compensate said respondents for the cost of providing space;

"It is further ordered, That the respondent carriers . . . are hereby . . . required to cease and desist . . . from storing goods . . . at rates and charges which fail to compensate said respondents for the cost of storing such goods, or providing such storage space.

"It is further ordered, That the respondent carriers . . . are hereby . . . required to cease and desist . . . from . . . handling goods . . . for shippers . . . at rates and charges which fail to compensate said respondents for the cost of said handling.

"It is further ordered, That the respondent carriers . . . (except The Central Railroad Company of New Jersey) . . . are hereby . . . required to cease and desist . . . from insuring goods . . . at less than the cost of providing such insurance.

"It is further ordered, That the respondent carriers above-named be, and they are hereby, notified and required to cease and desist from applying, by means of tariffs now on file with this Commission on or before April 15, 1937, noncompensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports.

"And it is further ordered, That respondent, The Central Railroad Company of New Jersey; be, and it is hereby, notified and required to cease and desist, on or before April 15, 1937, and thereafter to abstain, from subsidizing and granting concessions to the Newark Central Warehouse Company by means of noncompensatory rentals collected or received for the space leased by the Newark Central Warehouse Company from said respondent carrier, as fully described of record and in said reports."

below cost to the carrier authorized the order, without the further finding that the reasonable value of the service was above the charge.

It was the view of the Commission and the lower court that the finding of the Commission showed a violation of Sections 2, 3(1) and 6(7) of the Interstate Commerce Act.¹² These sections were enacted to assure the maintenance of rail transportation tariffs without rebate, discrimination or preference. No findings appear, nor has our attention been called to any evidence, which suggests the charges were made to meet the competition of the commercial warehousemen or were based upon the fair value of the services rendered, regardless of competition. On the contrary, it was the carriers' struggle to obtain line haul traffic which led them into the price cutting warfare. Charges for leases, storage, both in and out of the transit privilege, handling and insurance were alike slashed to meet the competition.

Since the tariffs for rail haul are fixed for the various points and freight classifications, every shipper must pay that tariff for his transportation. As the shippers of the Port of New York district can utilize, in many instances, commercial storage and other warehousing services in addition to rail transportation, a saving on the

¹² Act of February 4, 1887, c. 104, 24 Stat. 379, as amended; 49 U. S. C. A. Secs. 2, 3(1), 6(7).

"Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

"Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 6. (7) . . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

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non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit "by any device any portion of the rates." When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated.¹³ Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike¹⁴ there is violation of sections 2 and 3(1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business.

This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide storage-in-transit for milling, manufacturing or processing,¹⁵ but only the storage practices indulged in here to get rail transportation. In other circumstances fair value and market have been recognized as legitimate bases.¹⁶ Where competitive practices such as existed here are absent, reasonable or market value charges may well be the test. The power, however, is in the Commission, whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable.¹⁷ As in *Warehouse Co. v. United States*¹⁸ the Commission "rightly secured the discontinuance of the discrimination by ordering the carriers to cease employing the means by which it had been accomplished."

In-Transit Tariffs.—The carriers urge additional reasons why the order is invalid as to in-transit storage. They find in the order as to it all the alleged vices of the order with respect to leases and non-

¹³ Cf. *Wight v. United States*, 167 U. S. 512; *Seaboard Air-Line v. United States*, 254 U. S. 57, 63; *N. Y., N. H. & H. R. R. v. Interstate Commerce Commission*, 200 U. S. 361.

¹⁴ 198 I. C. C. at 197.

¹⁵ 216 I. C. C. 291, 356.

¹⁶ *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683, 684. Cf. *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 692; *Central of Georgia v. Blount*, 238 Fed. 292, 296.

¹⁷ Sec. 15(1), 41 Stat. 484, 49 U. S. C. Sec. 15(1).

¹⁸ 283 U. S. 501, 513.

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transit storage, which arise from basing the minimum charges on cost rather than market or fair value. They also contend that since the charges for in-transit arrangements are and must be published in tariffs, they are a part of transportation costs and therefore may be rendered at less than cost.¹⁹ Even if the in-transit warehousing is not technically transportation, say the carriers, its inclusion in tariffs is sufficient to protect it from the attack that its below-cost charges violate Section 6. The carriers insist that they do not remit by any device any portion of the specified tariff charges and that, as asserted violations of Sections 2 and 3 are predicated upon violations of Section 6, none of the findings as to in-transit charges supports the orders.

The Commission found that the in-transit warehousing was not a part of transportation. This finding is not affected by the determination of the Commission that the rates and charges should be published in the tariffs. Indeed, in its report on the subject the Commission said

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act."²⁰

We accept this conclusion.²¹ If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6(7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation

¹⁹ *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588; *St. Louis & San Francisco Railway v. Gill*, 156 U. S. 649, 665, 666; *Atlantic Coast Line v. North Carolina Commission*, 206 U. S. 1, 26-7; *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 600; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 268.

²⁰ 220 I. C. C. at 103-104.

²¹ *United States v. Am. Tin Plate Co.*, 301 U. S. 402, 406.

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rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the order valid in these circumstances.

Conclusion.—We do not discuss the suggestion that the order deprives the carriers of their liberty and property contrary to the 5th Amendment. If, as here held, the order is a valid regulation of rates for warehousing services which affect transportation tariffs, it cannot be unconstitutional. Appellants' contention of unconstitutionality is predicated on the invalidity of the order under the Interstate Commerce Act.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.